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pilotsage.

Report. 1968



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PART 1

Government
Publications



report of the
royal commission
on PILOTAGE

General introduction

Study of
canadian pilotage legislation
and general recommendations

Canada. Royal commission on
pilotsge

Report. 1968

report of the royal commission on PILOTAGE

PART I
ERRATA AND ADDENDA

Page	
98	409(i) should read 391(m)
103	C. 7 should read C. 6
123	p. 12 should read p. XXIV
136	subsec. 4(3) should read 4(e)
178	pp. 252-253 should read pp. 174-175
210	[second line] (vide 3 <i>infra</i>) should read (vide The Compulsory Payment System)
213	subsec. 391(a) should read 391(b)
241	The relationship of . . . does exist between . . . should read: The relationship of . . . does not exist between . . .
304	Desgroseillers should read: Desgroseilliers
325	p. 338 should read pp. 239 and 240
382	. . . the pilot is, or will be, indebted to the Pilotage Authority . . . should read: . . . the Pilotage Authority is, or will be, indebted to the pilot . . .
499	C. 6, pp. 186 should read: C. 6, pp. 192 and ff.
603	Millar, H.M.—Depart. of Public Works—143 should be inserted in between Middleton, K.C. and Miller, H.B.
811	[first line] 139 Code, c. 114, should read 1939 Code, c. 114.



*report of the
royal commission
on PILOTAGE*

General introduction

PART I

*Study of
canadian pilotage legislation
and general recommendations*

(Appendices in a separate volume)



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1968



CANADA

ROYAL COMMISSION ON PILOTAGE

To His Excellency

THE GOVERNOR GENERAL OF CANADA

May It Please Your Excellency

We, the Commissioners appointed pursuant to Order in Council dated 1st November 1962, P.C. 1962-1575, to inquire into and report upon the problems of marine pilotage in Canada and to make recommendations concerning the matters more specifically set forth in the said Order in Council: Beg to submit the following Report.

/s/ Bernier

CHAIRMAN

Robert K. Smith

J. J. Zemanick

J. W. Hadrian

SECRETARY

MARCH 1, 1968

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(Exclusive of Part VIA, Canada Shipping Act)

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GENERAL INTRODUCTION

TERMS OF REFERENCE

By appointment dated November 30, 1962,¹ authorized by Order in Council P.C. 1962-1575 dated November 1, 1962, the Royal Commission on Pilotage was required:

“to inquire into and report upon the problems relating to marine pilotage provided in Canada, more particularly under the Canada Shipping Act, and to recommend the changes, if any, that should be made in the pilotage system now prevailing, having regard to safety of navigation, development of shipping and commerce, the interests of pilots, shipowners, masters and the public generally; and in particular, without restricting the generality of the foregoing, the Commission shall consider and report upon:

- (a) the extent and nature of marine pilotage requirements, including compulsory pilotage, compulsory payment of pilotage dues and the granting of exemptions;
- (b) the duties, responsibilities and status of marine pilots; and
- (c) the adequacy of the organizational structure provided in the Canada Shipping Act for the administration, regulation and financing of pilotage, taking into consideration such factors as the provision of pilotage services, the determination, collection and disposal of pilotage dues, and the entry into service, technical standards, conduct, income, welfare and pension arrangements of pilots.”

The wide scope of these terms of reference and the detailed subjects mentioned therein are indicative not only of the many problems affecting the organization and control of pilotage in Canada, but also of the importance of pilotage to our national economy.

Canadian pilotage is affected by geographical, current, tidal, climatic, ice and weather conditions that create operational problems which may be encountered in one area but not in another. The need for trained professional pilots to guide ships safely in and out of these areas grew progressively with the development of the industrial and commercial strength of Canada. Thus pilotage, like other professions, has encountered problems in adjusting to changing times and conditions that attend growth in an expanding economy, in particular those created by the substantial increase in the size of ships throughout the years.

¹ The full text of the Commission's appointment is reproduced as Appendix I.

The importance pilotage has attained in Canada is further evidenced by the fact that, in the last fifty years, it has been necessary to appoint no less than five former Royal Commissions on the subject. One was appointed in 1913 to study the situation in the Pilotage Districts of Montreal and Quebec; another in 1918 to examine conditions in the Pilotage District of Halifax. Two similar inquiries were held in 1919, one for the Pilotage Districts of Vancouver, Victoria, Nanaimo and New Westminster, the other for the Pilotage Districts of Miramichi, Sydney, Louisbourg, Halifax, Saint John, Montreal and Quebec. Finally, a fifth was appointed in 1928 to examine and report upon the situation in the former short-lived Pilotage District of British Columbia. Twenty years later, in 1949, a Special Committee was appointed by Order in Council to consider pilotage matters in the Districts where the Minister was the Pilotage Authority. In more recent years, pilotage has been the subject of extended debates in both Houses of Parliament, particularly when Government measures were introduced to amend the Canada Shipping Act: February 1959 (Bill S-3), July 1960 (Bill C-80), and May-June 1961 (Bill C-98).

The mandate of this Commission, however, is very much wider than the terms of reference of the previous Commissions which dealt with pilotage matters only in some particular port or area. Indeed, this is the first time in Canadian history that a Royal Commission has been charged with the duty of conducting an inquiry into all aspects of pilotage, including the adequacy of applicable legislation, wherever the service is provided in Canadian waters.

BACKGROUND OF THE INQUIRY

In Canada, as in other countries, pilotage is a very old maritime occupation and, in fact, dates back to early colonial days. It has been on an organized basis on the St. Lawrence River for over 200 years, beginning with the appointment in 1731 of the first official pilot who was sent each season to Isle Verte (opposite Tadoussac) to await ships and bring them to Quebec. However, our present pilotage system goes back to 1873 when the Federal Parliament enacted the first "Pilotage Act" which abrogated most pre-Confederation pilotage legislation. Except for minor changes, the provisions of the 1873 Pilotage Act were retained and incorporated in the Canada Shipping Act when it was first introduced in 1906; in substance, they are still in effect.

This legislation has always dealt with pilotage as a service to shipping and the establishment of Pilotage Districts in Canada has been determined by local shipping needs in the light of existing conditions. Since the passage of the 1873 Act, 69 Districts have been established in this way but there are now only 26 in operation (including the Kingston District). These Districts (established, abrogated and operative) are listed in Appendix II.

There are now nearly 445 “licensed” pilots grouped in 25 Districts (excluding the Kingston District). There are also 85 Canadian “registered” pilots on the Great Lakes, 2 pilots employed by the Department of Transport operating at Goose Bay and an estimated 25 pilots operating mainly in non-organized areas. A list of the operative Districts, ports and areas where pilotage is performed, together with the number of pilots engaged in each, is in Appendix III.

Appendix IV is a map of Canadian navigable waters which shows the location and limits of existing Pilotage Districts and, in addition, the main areas where pilotage services (organized under the C.S.A. and others) are provided.

Organized pilotage in Canada has grown into a multimillion dollar business. In 1965, the total cost of pilotage was \$12,000,000; of this amount, the shipping interests paid \$10,700,000 (89%) and the balance of \$1,300,000 (11%) was paid by the Federal Government.

Except for the Great Lakes, pilotage at the present time is governed by the provisions of Part VI of the Canada Shipping Act (1952 R.S.C. c.29), which constitutes the basic pilotage law of Canada.

With regard to the Great Lakes, it became necessary—following the completion of the St. Lawrence Seaway in 1959—to arrange with the United States for the establishment of a joint pilotage system in the Great Lakes Basin, and a law of exception designed to deal with that particular situation was passed by Parliament in 1960 and incorporated in the Canada Shipping Act as Part VIA. Because of its special nature, pilotage on the Great Lakes is dealt with separately in Part V of the Report.

At the commencement of the inquiry, Newfoundland’s pre-Confederation pilotage legislation, i.e., The Port and Harbour of St. John’s Act No. 1 of February 18, 1946 and C. 179 of the Consolidated Statutes of Newfoundland, 1916, were still in effect. These have since been superseded by Part VI of the Canada Shipping Act; however, due to “survival notwithstanding repeal” provisions, the General By-law of the Pilotage District of St. John’s—which was passed under the pre-Confederation Newfoundland Statute—was still in effect as of Oct. 1, 1967. It is for this reason that no mention is made of the St. John’s District By-law in the study of legislation in Part I of the Report.

In addition, on the East Coast and on the Great Lakes, there are private and public pilotage organizations that are not governed by the Canada Shipping Act except for its provisions of general application, mainly because they are outside organized territories. At Goose Bay, for example, pilotage services are provided by the Department of Transport and the rates are fixed pursuant to sec. 18 of the Financial Administration Act.

The organization of pilotage under Part VI of the Canada Shipping Act centres around the establishment of fully decentralized, autonomous and financially self-supporting Pilotage Districts which, with the exception of Quebec and Montreal, which are constituted by specific provisions of the Act, are established by the Governor in Council. Formerly, each Pilotage District was under the direction of a local Commission of three to five members appointed by the Governor in Council. Through provisions, which originated in 1903 to 1905, by amendments to the applicable statutes, the Minister of Transport is the District Pilotage Authority for Churchill and Bras d'Or Lakes and for most of the main Districts, i.e., Sydney, Halifax, Saint John, Quebec, Montreal, Cornwall and British Columbia. In the remaining 16 Districts (excluding the three so-called Districts in the Great Lakes Basin), the original system was retained.

It is of importance to note the distinction between the compulsory payment of pilotage dues, which obtains in all Districts governed by Part VI C.S.A., except the Prince Edward Island District, and compulsory pilotage, which obtains in the Great Lakes Basin under Part VIA C.S.A. In the former situation, the Master of a non-exempt vessel is not obliged to employ a licensed pilot but whether he does or not he must pay dues; in the latter case it is mandatory to take a registered pilot on board and, if a vessel is in "designated waters", she can not be operated unless navigated by the pilot.

Three basic concepts of Part VI are:

- (a) the District Pilotage Authority, aside from its above-mentioned autonomous status, is a licensing authority enjoying certain regulation-making powers but having no authority either to provide or to direct the pilotage service;
- (b) the only permissible status of the pilots is that of self-employed, free entrepreneurs competing against one another for ships;
- (c) except on an inward voyage by a non-exempt ship, each Master or agent has the right to choose his pilot.

The actual situation, however, is altogether different. Pilotage, at least in all the larger Districts, is not only administered centrally but is fully operated and controlled by a Department of the Federal Government, the Department of Transport. In all main Districts, controlled pilotage has replaced free enterprise, the pilots are assigned to duty according to a *tour de rôle* system and they are *de facto* employees of their respective Pilotage Authority. This illegal situation which, in certain respects, meets real needs of pilotage, has existed for many years and has caused endless difficulties.

By early 1962, these difficulties had reached acute proportions and, at the opening of navigation in April of that year, the St. Lawrence River pilots went on strike for nine days—a walk-out which the British Columbia and Saint John pilots threatened to join. As part of the general solution to the

strike, the Federal Government agreed to appoint a Royal Commission to inquire into all aspects of pilotage in Canada. It was under these far from promising auspices that this Royal Commission was appointed November 30, 1962.

THE COMMISSION'S INQUIRY

The main function of this type of Royal Commission is, above all, to seek out facts. Its rôle is not to decide, to render judgment, but to discover all the facts pertinent to the multitude of problems that beset pilotage and its organizational structure so that those in authority may make appropriate decisions based on as complete knowledge as possible. The primary rôle of this Commission is, therefore, to inform; its secondary rôle is to recommend, that is, to suggest solutions which, in the light of its experience, appear to be appropriate.

Consequently, the first objective of the Commission was to unravel what appeared to be a very complex situation and establish the facts as correctly as possible. This included not only the many local problems directly affecting pilots, shipowners, Masters and the public generally, but also the broader questions of the present state of our pilotage law and its adequacy under existing conditions. For this reason, the Commission considered it essential to conduct an inquiry into the facts rather than an investigation based mainly on expressions of opinion, and to conduct this inquiry in public.

As a first step, the Commission prepared its own Rules of Practice and Procedure² to govern the submission of Briefs and the conduct of proceedings before it. These Rules were made known at the preliminary hearing held at Ottawa December 21, 1962, when all interested parties were informed that the Commission would not be sitting in judgment and that, since there was no trial, there would be no litigants before it and all witnesses would be considered Commission's witnesses. Submissions, briefs and testimonies might be given either in English or French, simultaneous translation would be provided at all sittings of the Commission in Ottawa and in the Province of Quebec, and elsewhere in Canada should it be deemed necessary. It was further pointed out that, as in any Court of Justice, the Commission would render its Report and base its recommendations only upon the facts properly established before it. This did not mean that secondary evidence would be rigidly refused but, where given, it would not be accorded as much weight as first-hand information. Nor did it mean that the Commission would be opposed to receiving information of a confidential nature but, if this was done, the information would only be used as a basis to orient the Commission's action in determining whether the matters thus brought before it should be made part of the record and, in the affirmative, the investigation would be held openly following the usual procedure.

² Appendix V.

This first decision indicated to all concerned at the very outset how the Commission understood and interpreted its mandate. The procedure, as originally laid down, was adhered to throughout the whole inquiry. Public hearings were concluded at Ottawa on January 15, 1965. At this last sitting, all parties were informed that, since they had all been given ample opportunity to be heard, the Commission now considered itself free to seek any additional information it deemed necessary, that the information thus obtained would be entered in the Commission's records as Exhibits, a list of which would be published from time to time, and that, should any of this information prove contentious, interested parties would be given an opportunity to present their case and, if necessary, to be heard at a public hearing convened for this purpose. Several hundred documents were so obtained to enable the Commission to complete its investigation but none required the holding of a hearing.

The Commission envisioned a heavy responsibility with far-reaching economic and geographical ramifications affecting Canada's economy. Its task was considered to include:

- (a) extensive geographical study of the problems outlined in the Commission's Terms of Reference, with "on site" examinations of pilotage areas;
- (b) investigations into problems on the Atlantic Seaboard, its adjacent waters, tributaries, harbours, bays, inlets and channels where skilled navigation by pilots is conducted or is necessary; of the St. Lawrence River with its tributary waters, including the Saguenay River; of the St. Lawrence Seaway and the waters of the Great Lakes with their connecting channels; of Hudson Bay; and of the vast expanse of the Pacific Coast, its islands and rivers, including the Fraser River;
- (c) economically, to investigate all aspects and conditions of the important profession of pilotage;
- (d) to be deeply concerned with the problems of the shipping industry, and all media of maritime transportation including the safe and expeditious transit of ships plying Canadian and connecting international waters;
- (e) to create close liaison with, and seek information from, all Federal departments involved with ships, shipping or pilotage;
- (f) to inquire into the *modus operandi* of the Department of Transport in its capacity as adviser to the Federal Pilotage Authority;
- (g) through the Under-Secretary of State for External Affairs, to inquire into the marine pilotage organization of other countries.

To achieve a comprehensive inquiry by obtaining the co-operation of Government departments, pilots of the various Districts and their representa-

tives, representatives of the shipping industry and all parties and persons involved in pilotage, it was considered essential to convene the several Commission hearings intended to be held at the principal ports from the East Coast of Newfoundland to the West Coast of British Columbia.

The Commission began to hear evidence in Charlottetown February 11, 1963, and continued its public sessions regularly until January 15, 1965, as above noted. In all the ports where hearings were held, their harbour and pilotage facilities were visited. During periods between hearings, the Commission toured all other pilotage areas. A list of the ports and places at which hearings were held, together with their dates, will be found in Appendix VI.

In January 1964, before commencing its investigation of pilotage on the Great Lakes where Canada and the United States have common interests, the Commission visited Washington to obtain general information on the laws and regulations governing pilotage in the United States. Calls were paid on U.S. Government officials to advise them of the Commission's intention to inquire into the pilotage situation in that area and to extend an official invitation to attend the investigation. A visit was also made to New York in October 1964 to gain first-hand knowledge of the organization and operation of pilotage as constituted under the laws of New York and New Jersey, which had been quoted as an example by the Federation of the St. Lawrence Pilots and which, the Commission was informed by the Washington officials, had served as a model for organizing the American pilots on the Great Lakes.

The Commission's investigation and studies have already achieved some positive results. *Inter alia*, some recommendations made to the Commission have already been implemented and many amendments were made to District By-laws as a result of the situation revealed by the evidence produced at the hearings. The Commission's hearings also gave the parties concerned a forum to air their grievances and the opportunity to state their case fully. The greater appreciation thus obtained of the problems of others and of the general situation has resulted in better understanding and marked, increased co-operation.

REVIEW OF EVIDENCE

While it was clear from the beginning that the Commission had a broad mandate, the extent of its task was not fully realized until it began reviewing the evidence it had gathered during the public hearings, which alone took 175 days. The testimonies covered 25,000 pages of transcript. A total of 336 persons testified under oath and 34 additional persons addressed the Commission. The names of these persons are listed in Appendix VII. Over 1,700 exhibits were filed, mostly by bundles of correspondence, statistics and financial documents, all of which contained valuable information that had to be carefully scrutinized. In addition, 62 Briefs, some book-size, were submitted. These are listed in Appendix VIII.

The review and analysis of the evidence proved a monumental task. This was done progressively, District by District, generally in the manner in which the evidence was collected.

The problems which emerged frequently proved so varied and complex that their solution required profound research, including study of the historical background and legislative history of pilotage throughout the country. Moreover, the evidence submitted was, on occasion, found incomplete, thus forcing the Commission to pursue its inquiries, usually through an exchange of correspondence with the interested parties. This additional evidence subsequently became part of the public record and was filed as Exhibits according to the procedure already described.

While the Commission concluded that the pilotage services now provided are, on the whole, performed satisfactorily, it also found that the present organization and control of pilotage exist in contravention of the law. The Commission's finding concerning the absence of a proper legal basis for most of the existing administration of pilotage was such a startling development that it was deemed necessary to undertake a detailed analysis of the pilotage provisions of the Canada Shipping Act to verify the correctness of this conclusion.

As the Commission's deliberations progressed, certain research studies by experts were considered essential, i.e.:

- (a) cost of pilotage;
- (b) economic impact of pilotage;
- (c) assessment of pilotage dues;
- (d) pension arrangements for pilots.

The results of these studies are reproduced at the end of this Report as Appendices IX to XII inclusive.

It was necessary to conclude the financial and economic studies with the year 1965. The release of Part I of the Report would have been unduly delayed by waiting for the financial statements of the 1966 fiscal year which ended on March 30, 1967, and for the Dominion Bureau of Statistics figures for the year 1966. The 1966 figures will be quoted in the Report where deemed pertinent and if available; any material changes will be recorded in the closing remarks at the end of Part V of the Report.

The Commission also made studies of the broad aspects of pilotage in Australia, Belgium, Denmark, France, Greece, Italy, the Netherlands, New Zealand, Norway, Sweden, the United Arab Republic (Suez Canal), the United Kingdom, the United States of America (including the Panama Canal) and West Germany (including the Kiel Canal). Details of the pilotage legislation in those countries were obtained through diplomatic channels and were filed as Exhibits. Information with respect to most of the above European countries, as well as the United

States and Egypt, was also obtained at the Commission's hearings from the Federation of St. Lawrence River Pilots which had sent two representatives abroad to study pilotage in those countries before submitting its brief and recommendations to the Commission. Summaries of the pilotage legislation and organization in these countries are appended as Appendix XIII. Although these studies proved most useful to the Commission in the general direction of its recommendations, little time was spent in detailed study of the organization and operation of pilotage in the countries named because it soon became evident that pilotage is basically a local matter and few countries have as many diversified types of pilotage operations as are found in Canada.

PLAN OF THE REPORT

The Report is presented in five Parts, each contained in a separate volume or group of volumes:

Part I, a study of legislation, is a synthesis, accompanied by fourteen appendices in a separate volume. It directs attention to the present state of the law on pilotage (Part VI of the Canada Shipping Act) and related legislation, reports on its adequacy or otherwise in the light of existing conditions as disclosed by the evidence, and recommends the basic changes that should be made in the law to meet the present and foreseeable future requirements of the pilotage service. The one exception made in this general review of the law is with respect to pilotage on the Great Lakes (Part VIA of the Canada Shipping Act) which is dealt with in Part V of the Report. The Commission's general recommendations concerning the basic principles which should underly this new legislation, together with certain basic reforms deemed desirable in the general organizational structure of pilotage, appear at the end of Part I of the Report.

Part II (West Coast and Churchill), Part III (Atlantic Provinces) and Part IV (St. Lawrence) contain the fact-finding reports on the pilotage situation in each of the 25³ Pilotage Districts administered under Part VI of the Canada Shipping Act. For purposes of reporting, these Districts have been grouped according to their geographical area and each individual Report follows the same pattern, namely:

- (a) the legislation, including its historical background, pertaining to the establishment and administration of the District;
- (b) the Briefs submitted in connection with pilotage in the District;
- (c) the summation and analysis of the evidence on all aspects of pilotage in the District; and
- (d) the Commission's recommendations, more specifically as they affect pilotage in that District.

³ It should be noted that the Kingston District, which was created under Part VI C.S.A., is also known as the so-called Great Lakes District No. 1 governed by Part VIA, C.S.A., together with the so-called Great Lakes Districts Nos. 2 and 3.

Part V deals with pilotage on the Great Lakes. As mentioned earlier, pilotage in that area is a totally distinct matter involving separate legislation by Canada and the United States designed to facilitate, by agreement between the two countries, the operation of a joint pilotage system in the Great Lakes Basin. For this reason, as much as because of the international aspects, the Commission deemed it desirable to report upon the results of its inquiry and make the recommendations in connection with this matter the subject of a separate Report. This Part, which concludes the Report, also contains some general closing remarks and the Commission's acknowledgement of the generous co-operation and valuable assistance received at all times.

The Court cases cited in the Report are listed as an Appendix to each Part. For Part I, see Appendix XIV.

Part I

STUDY OF CANADIAN PILOTAGE LEGISLATION

(EXCLUSIVE OF PART VIA, CANADA SHIPPING ACT)

Chapter 1

HISTORY OF LEGISLATION

PREAMBLE

A clear understanding of the effectiveness of existing pilotage legislation requires careful study of the origin of this legislation and the circumstances that prevailed when it was introduced because some of its provisions are meaningless, or at least ambiguous, in the light of present day conditions alone. Such a study reveals that the first federal legislation, the 1873 Pilotage Act which had its origin in the 1854 Merchant Shipping Act of the United Kingdom, has survived to the present with no material change in the basic scheme of organization it originally provided, despite the fact that the circumstances and requirements of the service have materially changed since 1873. Hence the basic organization provided by the law no longer corresponds to modern requirements. Since 1873 there has been no serious attempt to bring pilotage legislation up to date and most changes have been limited to making the 1873 general scheme of organization applicable to all Districts by repealing those portions of the former organization in the four Districts of Quebec, Montreal, Halifax and Saint John, N.B. which had been retained in the 1873 Act as exceptions. This aim was attained, except for two minor points (sec. 328 and Quebec Pilot Fund), in 1934 and 1950.

The few changes made in the main part of the legislation to remedy the resultant maladjustment were never in depth and generally conflicted with the main body of the Act by introducing provisions that were incompatible with the basic scheme. The necessary basic changes were brought about by the illegal and ultra vires process of amending statutory legislation by local by-laws with the result that the organizational schemes stipulated in the various by-laws under which the pilotage service now operates are in direct conflict with Part VI of the Canada Shipping Act and are, therefore, illegal although in general they meet the existing needs of the service. It is believed that this climate of illegality is the main cause of the present chaotic and inefficient state of pilotage organization and of the loss of authority of those in charge.

LEGISLATION IN 1867

The Pilotage Act of 1873, the first pilotage legislation passed by Parliament after Confederation, is a complex law which provides for a general scheme of organization but, on the other hand, establishes or maintains a special status for the four main Pilotage Districts, namely, Montreal, Quebec, Saint John and Halifax.

Prior to Confederation, each province had its own legislation tailored to its own needs. After Confederation, pilotage fell within federal jurisdiction and the various provincial acts continued to apply until replaced by federal legislation.

The main features of the provincial legislation governing pilotage that existed in 1867 (for details see the Historical Section of each District concerned):

- (a) In Upper Canada there was no pilotage legislation; in fact there was little, if any, pilotage because the ships in those waters were small, regular traders whose Masters were conversant with local navigation conditions.
- (b) In Lower Canada, however, the situation was quite different because there was regular ocean-going traffic trading up to Montreal. Hence, there had been pilotage legislation since the early days of the French colony. No general legislation existed or was needed because the only pilotage problem was river pilotage on the St. Lawrence. At the time of Confederation, the legislative situation was as follows:
 - (i) For the Port (District) of Quebec, there was the Quebec Trinity House Act of 1849 (12 Vic. c. 114) and the *Corporation of Pilots For and Below the Harbour of Quebec Act* of 1860 also referred to as the Quebec Pilots Corporation Act (23 Vic. c. 123). Trinity House was a public corporation responsible for the navigable channel of the St. Lawrence River from Portneuf Basin, above Quebec, down to the Gulf and among its various duties was that of Pilotage Authority. As such, it exercised three distinct powers: first, delegated power of legislation, i.e., regulation making; second, licensing power; third, judicial power as a court of records over all pilotage matters. The Quebec system was unique in that the free exercise of the pilot's profession had been abolished by the Quebec Pilots Corporation Act of 1860; providing and administering the service were responsibilities of the Pilots' Corporation which, pursuant to the 1860 Act, operated a tour

de rôle system and provided the pilots' remuneration on the basis of equal shares of the net Corporation earnings, that is, pilotage money earned by all the District pilots, less pilotage and Corporation operating expenses.

- (ii) For the Port (District) of Montreal, only the Montreal Trinity House Act of 1849 was in force (12 Vic. c. 117). This public corporation had the same powers over pilotage as its Quebec counterpart. Administration and provision of pilotage were left to each pilot under the free enterprise system which then prevailed. In 1850, 13-14 Vic. c. 123 incorporated the Montreal pilots as *The Corporation of the Pilots For and Above the Harbour of Quebec*. However, this Corporation never became operative although the Act which incorporated it was apparently never repealed.
- (c) In Nova Scotia, pilotage was on a harbour basis with distinct and unrelated pilotage needs and, therefore, the law provided a general basic scheme of organization for the creation and operation of independent port pilotage units. The pilotage legislation (R.S.N.S. 1864 (3rd ser.) c. 79) applied to Halifax as well as to several other ports in the province. The Act provided that pilotage in each port came under the authority of Commissioners appointed by the Governor. They had power to make regulations and to license pilots.
- (d) New Brunswick resembled Nova Scotia in that there was general legislation applicable to all ports (except Saint John), namely the 1786 Ordinance (26 Geo. III) which, with some amendments, was still in force at the time of Confederation. It provided for pilotage by independent contractors licensed in each of the counties by Justices of the Common Pleas on the recommendation of three or more wardens of the port concerned. The magistrates and wardens were the Pilotage Authority and, as such, had regulation-making powers and were charged with enforcing the law. In the Harbour of Saint John, pilotage came under the jurisdiction of the City of Saint John (City of Saint John Charter 1785 (25 Geo. III)).
- (e) When British Columbia joined Confederation in 1871, the pilotage law in force was the Pilotage Ordinance of 1867 which provided basically the same scheme of organization as now exists in the Canada Shipping Act, that is, pilotage organized on a harbour basis and performed by independent contractors with a Pilotage Authority consisting of a board appointed by the Governor and granted regulation-making and licensing powers.

FEDERAL LEGISLATION 1867-1873

Between 1867 and 1873 the Federal Parliament passed five laws relating to pilotage. Three were amendments to the Quebec Trinity House Act and to the Quebec Pilots Corporation Act which dealt exclusively with pilotage in the Port of Quebec. The fourth concerned pilotage in Charlotte County, N.B. (35 Vic. c. 43) and the fifth, in 1869 (32-33 Vic. c. 41), contained the first provisions passed by the Federal Parliament concerning pilotage in general. It exempted government-owned vessels from pilotage in all Canadian ports and extended exemptions from compulsory pilotage in the Port of Quebec to all vessels not exceeding 150 tons registered in any port in Canada. However, when these exempted vessels required a pilot they had to employ a Quebec branch pilot.

PILOTAGE ACT 1873

The first Federal Pilotage Act, which was passed in 1873, established a general scheme, based on the 1854 Merchant Shipping Act of the United Kingdom (17-18 Vic. c. 104, Ex. 1482), which followed the organization existing at that time in British Columbia and Nova Scotia and was quite similar to the regulations governing port pilotage in New Brunswick. In addition, the Act maintained the special pilotage organization on the St. Lawrence River, *inter alia*, the special status of the Pilotage Authorities of Quebec and Montreal including the judicial powers that they alone enjoyed, and the special status of the Quebec pilots, that is, their compulsory partnership under their 1860 Act of incorporation. It extended the Montreal and Quebec concept of a Pilotage Authority composed of representatives of local interests and government appointees to the two other major harbours in Canada at that time—Halifax and Saint John, N.B.—and provided them with the same exceptions from the general scheme that existed in Quebec and Montreal, except that the pilots remained free entrepreneurs and that the Halifax and Saint John Pilot Commissioners did not enjoy any judicial powers. There, as in all Pilotage Districts except Quebec and Montreal, pilots had to be prosecuted before the regular courts for offences and breaches of regulations.

Most of the provisions of the 1873 Canadian Act dealing with the general organization of pilotage can be traced almost verbatim in the 1854 U. K. Act. The main principles are that pilotage is established for the convenience of shipping and is based on the free exercise of the profession by independent pilots whose qualifications have been certified by the licensing authority. The Master's right to choose his pilot is hardly ever interfered with and his right not to employ a pilot is recognized. However, in certain Districts named in the Act or where the Governor in Council has so decided, the Master is urged to employ a pilot by being obliged to pay the same amount of money whether he takes a pilot or not, i.e., the compulsory payment

system. In this regard the Canadian legislation was slightly at variance with the U.K. legislation, but basically it was a pure matter of semantics. In Canada, care was taken not to use the term “compulsory pilotage” which appeared in the 1854 Act and which was the system in operation in the Ports of Quebec and Montreal, but the effect was the same. In U.K. Districts where pilotage was compulsory, a Master was always permitted to navigate without a pilot but he was liable to a penalty of double the normal dues; in Canadian Districts where the payment of pilotage dues was compulsory, the Act stipulated the Master’s right not to employ a pilot but retained a financial penalty in fact, if not in name, in that the dues were payable just the same. Both Acts had three types of exemption: ships to which no pilot offered his services on the inward voyage, ships piloted by one of their officers who held a pilot’s certificate, and ships exempted by statute.

Canadian Pilotage Authorities had only two powers: to legislate by regulations within the limits contained in the Act and to license pilots, including the right to suspend and to withdraw such licences as defined in the Act. In addition, Pilotage Authorities were required to supervise the conduct and behaviour of their licencees and they were given related powers necessary to discharge their responsibilities. This basic scheme of organization has not been changed in substance since it was included in the 1873 Act.

Because of its long past and its many pilots, the Quebec Pilotage District had inherited a very advanced state of legislation that the 1873 Act desired to preserve. This aim was achieved by inserting a large number of provisions that were applicable only to the District of Quebec. The rights conferred by the 1860 Act on the Corporation of Pilots For and Below the Harbour of Quebec had to be recognized; hence, it was stipulated that nothing in the new Act was to be construed as giving power to Trinity House of Quebec “to make regulations respecting the management or maintenance of pilot boats, or respecting the administration or distribution of the earnings of pilots and pilot boats....” (sec. 91), and even over licensing of pilot boats (sec. 74). Since in Quebec the pilotage dues belonged to the Pilots’ Corporation, it was necessary to include in each section of the Act which stated that the dues were payable to the Pilotage Authority a provision that, in Quebec, they were to be paid to the Pilots’ Corporation (secs. 52, 57, 59 and 60). The managerial powers of the Pilots’ Corporation were duly recognized (secs. 85-88). The Act retained the requirement that the apprentices had to be indentured to the Pilots’ Corporation and also had to serve turns aboard pilot schooners belonging to the Corporation (sec. 25). The number of apprentices was fixed at a minimum of 36 and a maximum of 60 (sec. 26). Because the Pilots’ Corporation was responsible for administering the pilotage service, the statutory offence of refusing or delaying to take charge of a vessel was, as an exception, made subject to the provisions of the Quebec Pilots’ Corporation Act (subsec. 70(7)). The Trinity House By-laws respect-

ing pilotage had to be submitted to the Pilots' Corporation 20 days before being submitted to the Governor in Council for approval (sec. 21). In addition, the Quebec Pilotage Authority was denied full discretion to determine the number of pilots since the Act provided that their number was not to be less than 150 and was not to exceed 200 (they numbered 280 in 1860). The existing tariff was not to be reviewed except when over a three-year period the average annual remuneration per active pilot was less than \$600. Trinity House was denied the right to license apprentices (subsec. 18(4)) and to fix their number (subsec. 18(6)).

The district limits of both Districts of Montreal and Quebec were fixed by the Act (secs. 5 and 6) and sec. 49 dealt with the special problem resulting from their contiguity by setting a limit to the extent of their joint jurisdiction over the Harbour of Quebec (sec. 49). The provisions of the Act regarding the creation and administration of the pilot fund were made not applicable to these Districts because the matter was already dealt with in the Quebec and Montreal Trinity House Acts. The Montreal Harbour Commissioners superseded Montreal Trinity House as Pilotage Authority for the District of Montreal (secs. 2 and 6).

The Act created for the Halifax and Saint John Districts a public corporation type of Pilotage Authority composed of representatives of local interests and of government appointees but it did not fix the district limits as in Quebec and Montreal. The reason, no doubt, was that for the Districts of Quebec and Montreal the limits were already established in the applicable Trinity House Act and, therefore, could not be varied by the Governor in Council. Since this problem did not exist for the Halifax and Saint John Corporations, which were created by the Pilotage Act, the task of fixing the limits was delegated to the Governor in Council (secs. 7 and 12). Secs. 11 and 16 provided for the appointment of a Secretary-Treasurer for each Corporation at a salary of \$800 to be paid by the Crown.

In all four Districts, the Pilotage Authorities were denied the power to grant pilotage certificates enabling Masters and mates to pilot their own ships (subsec. 18(4) and sec. 65), and by statute the payment of dues was made compulsory (sec. 57).

There was one provision that was applicable to the District of Saint John alone, that is, the right to vary statutory exemptions. These could not be altered in any other District.

Some amendments to the Quebec and Montreal Trinity House Acts were repealed completely as was all the New Brunswick pilotage legislation including the Act passed the previous year by the Federal Parliament respecting pilotage in Charlotte County (35 Vic. c. 43), the whole of the pilotage legislation of British Columbia and the Federal Act passed in 1871 to place all Canadian vessels on an equal footing as regards pilotage in the Port of Quebec (32-33 Vic. c. 41). The Quebec Trinity House Act (12 Vic.

c. 114), The Montreal Trinity House Act (12 Vic. c. 117), and the Nova Scotia Act regarding harbour pilotage and Harbour Masters were repealed in part only (12 Vic. c. 79). However, none of the provisions of the Quebec Pilots Corporation Act of 1860 was affected.

AMENDMENTS 1873-1886

Until the 1886 revision, the main amendments to the Act were the following:

- (a) In 1875 (38 Vic. c. 28), *inter alia*, the sections of the Act which provided for paying the remuneration of the Halifax and Saint John Secretary and Treasurer out of public funds were repealed and replaced by a general section empowering all Pilotage Authorities, except Quebec, to pay the operating expenses of the District out of pilotage revenues. The exception for Quebec was no doubt the result of its special organization which made it unlikely that the Pilotage Authority would incur any substantial operational expenses since the service was managed by the Pilots' Corporation; the dues belonged and were payable to, and were collected by, the Corporation. This is the origin of sec. 328 of the present Canada Shipping Act which has remained unchanged ever since.
- (b) In 1875 (38 Vic. c. 55), the Harbour Commissioners of Quebec superseded, as Pilotage Authority, Quebec Trinity House which ceased to exist. The trusteeship and management of the pilot fund were transferred to the Pilots' Corporation, powers that it has retained ever since.
- (c) In 1877 (40 Vic. c. 20), the procedure whereby clearance was not to be issued by the Customs Officer until the pilotage dues had been paid or settled was introduced. This provision has not changed materially since and is now subsec. 344(1) of the present Canada Shipping Act.
- (d) In 1879 (42 Vic. c. 25), the power of the Pilotage Authorities (other than Quebec, Montreal, Halifax and Saint John) to issue pilotage certificates to Masters and mates to pilot their own ships was limited to ships registered in Canada. The Montreal Pilotage Authority was given the power to grant second-class pilot licences and to fix a special scale of dues for their services.
- (e) In 1882 (45 Vic. c. 32), Pilotage Authorities were given the power to administer oaths and to examine witnesses under oath in matters which they had the power to investigate. The Pilotage Authorities for all Districts including Halifax, but excluding Quebec, Montreal and Saint John, were authorized to limit pilot licences to a term of not less than two years and to renew such licences at their discretion for a further limited term of not less than two years. It was

further provided that no licensed pilots were to be thereafter appointed to act as Harbour Masters. The minimum and maximum number of pilots for the Harbour of Quebec was reduced and the Quebec Pilotage Authority was empowered to fix the number of apprentices indentured to the Corporation of Pilots.

CONSOLIDATION 1886

When the Pilotage Act was consolidated in 1886 (1886 R.S.C. c. 80), no material change was made, except the insertion of a definition of "pilotage dues" that in the 1873 Act was identified with "pilot's remuneration" and in the new Act was defined as "the remuneration payable in respect of pilotage", a definition that is still carried in the present legislation.

AMENDMENTS 1886-1906

Between 1886 and 1906 the main amendments were the following:

- (a) In 1900, 63-64 Vic. c. 36 deprived the Montreal Pilotage Authority, that is, the Montreal Harbour Commissioners, of its judicial powers and the Montreal Pilots' Court was created. In addition to having general judiciary jurisdiction in pilotage matters, the Court was to conduct inquiries into shipping casualties if so directed by the Minister of Marine and Fisheries.
- (b) In 1902, 2 Edward VII c. 27 amended the exemptions section, *inter alia*, by providing that the Pilotage Authorities for Halifax, Sydney, Miramichi, and Pictou could vary these exemptions with the approval of the Governor in Council.
- (c) In 1903, 3 Edward VII c. 48 appointed the Minister of Marine and Fisheries the Authority for the District of Montreal but only with the powers that had previously been, and remained, vested in the Montreal Harbour Commissioners as Pilotage Authority for that District.
- (d) In 1904, 4 Edward VII c. 29 amended the Pilotage Act to incorporate the precedent established the year before whereby the Minister could be appointed Pilotage Authority in lieu of the normal local board, provided this was recommended by local interests and the Governor in Council was satisfied that it was in the interest of navigation.
- (e) In 1905, by 4-5 Edward VII c. 34 the Quebec Harbour Commissioners were superseded as Pilotage Authority by the Minister of Marine and Fisheries but only with the powers that the said Corporation had held as such, except that its judiciary powers were to be exercised by the Court provided in the Shipping Casualties Act of 1901 or by a tribunal or an officer designated by the Minister.

These major modifications to the Montreal Pilotage District organization had been prompted by the report of a Royal Commission created in 1898 following the 1897 Montreal pilots' strike.

CANADA SHIPPING ACT 1906

In 1906, following the example of the United Kingdom, Parliament consolidated in one Act, called the Canada Shipping Act of 1906 (1906 R.S.C. c. 113), all the laws pertinent to navigation including the Pilotage Act of 1886 and its amendments, and the Shipping Casualties Act of 1901 and its amendments. However, the U.K. was soon to revert to the old system by making its pilotage legislation a single, complete and distinct Act, the Pilotage Act of 1913. This was effected on the specific recommendation of a departmental committee which held an inquiry into pilotage in 1909. Its report was submitted in 1911.

As far as pilotage was concerned, the 1906 Canada Shipping Act was merely a consolidation and contained no new material. For instance, in the District of Quebec the designation of the Quebec Harbour Commissioners in the definition of the Quebec Pilotage Authority was replaced by the Minister. In Montreal, the existing texts were modified to incorporate various amendments, e.g., the change in Pilotage Authority, the creation of the Montreal Pilots' court, the right to issue second-class pilotage licences to apprentices, etc. There were no changes affecting Saint John and Halifax.

AMENDMENTS 1906-1927

When the next consolidation of the Act occurred the following amendments were made:

- (a) In 1914, on the recommendation of the Lindsay Royal Commission of 1913, 4-5 George V. c. 48 abolished the compulsory partnership of the Quebec pilots that had been created by the Quebec Pilots Corporation Act of 1860. The Pilots' Corporation was deprived of its rights over the pilotage dues earned by the pilots and all its powers over the management of the pilotage service, namely, to maintain and operate pilot boats at the seaward stations, to collect pilotage dues, to control and manage pilots and apprentices. These powers were vested in the Minister as such who could then administer the service and the pilots instead of the Corporation. The Quebec Pilots Corporation retained only the trusteeship and management of the Pilots' Fund. This Act, except section 3 which dealt with the Pilot Fund, was later repealed by the revised statute of 1927 which retained all the special provisions of the 1906 Act regarding the Quebec Pilots Corporation and

merely substituted the Minister for the Corporation. This gave the Minister, as such, a power that he did not have as Pilotage Authority and that no Pilotage Authority in any other District possessed, i.e., the power to manage the pilotage service and to control the pilots.

- (b) In 1916, by 6-7 George V c. 13 the statutory limitation on the number of pilots for the District of Quebec was further decreased and only a permissible maximum was established: their number was not to exceed 125.
- (c) In 1919, by 9-10 George V. c. 41, sec. 432 of the 1906 C.S.A. regarding the appointment of the Minister as Authority in any District, was amended by deleting the requirement that this had to be recommended by local interests. No doubt the main reason was to legalize the appointment of the Minister as Pilotage Authority for the Halifax District that had been enacted the year before under the War Measures Act following a specific recommendation of the Robb Royal Commission (Ex. 1178).
- (d) In 1922, by 12-13 George V c. 9 the exemptions section was re-amended and the name of the Saint John District was inserted in the list of Districts where the Pilotage Authority had the power to vary the exemptions with the approval of the Governor in Council.

CANADA SHIPPING ACT 1927

The 1927 Canada Shipping Act (1927 R.S.C. c. 186) was, as far as pilotage legislation was concerned, merely a consolidation. It contained no material changes and even omitted the actual modifications to the status and composition of the Halifax Pilotage Authority and the Saint John Pilotage Authority (Ex. 1509). The Act repeated the statutory provisions that the Authority was to consist of Commissioners appointed and elected as stated in the 1873 Act although, in fact, the Pilotage Authority in both Districts had been the Minister since 1919.

AMENDMENT 1933

There was only one amendment between 1927 and 1934. In 1933, 23-24 George V c. 52 added to the section authorizing the appointment of the Minister as Pilotage Authority the necessary provisions to assure the continuity of the office in his absence and also, in order to overcome the inconvenience caused by his remoteness from various Districts where he might be the Pilotage Authority, empowered him to delegate by by-law any or all of his powers to anyone he chose, *inter alia*, to a local representative called the Superintendent of Pilots for a particular District.

CANADA SHIPPING ACT 1934

A new Canada Shipping Act was passed in 1934 (24-25 Geo. V c. 44) as one consequence of the Statute of Westminster which changed Canada's legal status. Among other things the new Act repealed practically all the previous legislation on pilotage.

The main pilotage feature of the new Act was that it did away almost completely with what still remained of the special systems the four main Districts had enjoyed. Halifax and Saint John, N.B., were fully integrated and all reference to their special status were deleted from the Act.

The process was not as thorough for the Districts of Montreal and Quebec. Perusal of the Act suggests that when it was first drafted the intention was that these two Districts should also be made to conform to the general rules but, both while the Act was being drafted and during its adoption by Parliament, modifications were made with the intent of retaining some features of these Districts (often termed "acquired rights") which were contained in previous legislation. The result was that these changes were incorporated somewhat hastily without ascertaining whether they were in agreement with the remainder of the Act as re-drafted. The result was a confused legal situation owing to the equivocal status of the Pilotage Authority, the contentious power of the Governor in Council to alter the limits of these Districts and the illegality of the compulsory payment system. This unsatisfactory state of affairs has not been corrected and still persists.

What still remained of the special organization which the Quebec District inherited from the Trinity House Act and the Pilots Corporation Act was abolished except the Quebec Pilots Corporation trusteeship of the Decayed Pilot Fund, and the ban on the Quebec Pilotage Authority using pilotage money to pay District operating expenses.

The sections which dealt with the control and management of the pilotage service in the District of Quebec were repealed with the result that the Minister lost those powers he had inherited from the Quebec Pilots' Corporation by virtue of the 1914 Act. In law the system of organization automatically reverted to what it had been prior to 1860 but, in fact, the Pilotage Authority took charge and has provided and managed the service ever since.

The sections which established the Montreal Pilots' Court were repealed with the result that the prosecution of offences and the discipline of pilots were to be dealt with according to the general rules provided in the Act for all Districts. The restriction on the Montreal Pilotage Authority regarding the creation of a Pilot Fund and its management was withdrawn and the statutory provision concerning the issue of second-class pilots' licences was cancelled.

The special sections dealing with the granting of pilotage certificates to Masters and mates, and imposing various duties on them, were abolished and

the whole question was transferred to the Pilotage Authorities to be resolved under their regulation-making powers. The Pilotage Authorities of Quebec, Montreal, Halifax and Saint John were thus empowered to issue such certificates for the first time. The power to amend some of the statutory exemptions was extended to all Districts. The statutory right of appeal that the Quebec pilots had always enjoyed was withdrawn.

An effort was made to simplify the presentation of the pilotage provisions in the 1934 Act by re-arranging the sections in a new order, by deleting sections which presumably were found to be no longer applicable and by integrating other sections with the general provisions of the Act. For instance, the penal sanction for not complying with a provision was made part of the section concerned whereas before all the penal sanctions were segregated at the end of the Act. A distinction was made between fines and penalties and the provisions to impose and recover these were incorporated in the chapter of the Canada Shipping Act dealing with legal proceedings. Some provisions were delegated, *inter alia*:

- (a) Sec. 465, 1927 C.S.A., which gave the Master of an exempted ship the status of a pilot respecting privileges, duties and responsibilities.
- (b) The statutory provisions regarding the White Flag Certificate (secs. 467 to 473 inclusive, 1927 C.S.A.), *inter alia*, the provision that restricted the issuance of pilotage certificates to Masters and mates of Canadian registered vessels only. The whole matter was left to the Pilotage Authority to settle under his regulation-making powers.
- (c) Secs. 475, 476, 478 and 481 inclusive, and 521 and 522, 1927 C.S.A., dealing with the characteristics of decked and open pilot boats and the penal sanction for infringement.
- (d) Sec. 494, 1927 C.S.A., enabling the Pilotage Authority to administer oaths to witnesses appearing before them.
- (e) That part of sec. 456, 1927 C.S.A. (not included in sec. 337, 1934 C.S.A.), which stipulated that when, on an outward voyage, a non-exempt ship had not employed a pilot, pilotage dues were then payable to the Pilotage Authority.
- (f) Sec. 447, 1927 C.S.A., dealing with the jurisdiction of the Pilotage Authorities of Quebec and Montreal over the Harbour of Quebec.
- (g) Sec. 452, 1927 C.S.A., which laid down the procedure for adjusting a special type of dispute between a Master and a pilot when they were ascertaining the draught of a ship.
- (h) Subsec. (2) of sec. 414, 1927 C.S.A., which denied the Minister as Pilotage Authority the right to sit as a tribunal in pilotage matters.

- (i) The statutory definition of the signals which indicated that a pilot was required (sec. 466, 1927 C.S.A.). The responsibility for determining the form these signals should take was delegated to the Governor in Council (sec. 356, 1934 C.S.A.).

Certain provisions were extended to all Districts by the deletion of the former restrictions they contained, *inter alia*:

- (a) Each Pilotage Authority was left free to make regulations governing apprentices.
- (b) All Pilotage Authorities were given the right to limit the duration of a pilot's licence to a minimum of two years.
- (c) Each Pilotage Authority was required to maintain a licence register (sec. 342, 1934 C.S.A.).
- (d) Except in the Montreal District, each Pilotage Authority was permitted discretion over some of the statutory exemptions (sec. 339, 1934 C.S.A.).

In the Districts of Quebec and Montreal, *inter alia*, the following were deleted:

- (a) The statutory appointment of their Pilotage Authority.
- (b) The necessity for the Quebec Pilotage Authority to submit proposed by-laws to the Quebec Pilots' Corporation prior to their submission for approval to the Governor in Council (sec. 419, 1927 C.S.A.).
- (c) The statutory restrictions on the number of pilots in the District of Quebec (sec. 423, 1927 C.S.A.).
- (d) The statutory provisions regarding compulsory contributions by the Montreal pilots to the Decayed Pilot Fund (sec. 484, 1927 C.S.A.).
- (e) Secs. 491, 492, 493, 527 and 528 regarding the managerial power of the Minister, in lieu of the Quebec Pilots' Corporation, over pilotage in the District of Quebec.
- (f) Secs. 495-509 inclusive, 1927 C.S.A., dealing with the Montreal Pilots' Court, sec. 510 regarding the special procedure for dealing with complaints against pilots of the Pilotage District of Quebec and 541 regarding the special procedure for recovery of penalties in the Quebec District.

Among the innovations in the Act were:

- (a) Including the Deputy Minister of Marine (now Transport) in the definition of Pilotage Authority when the Authority is the Minister of Marine (now Transport) (subsec. 2(70), 1934 C.S.A.).
- (b) Extending the statutory exemptions from Canadian registered ships to British Commonwealth registered ships (sec. 338, 1934 C.S.A.)

but, on the other hand, limiting the exemptions of local and coastal traders which formerly applied to steamships of any nationality to steamships of British flag only.

- (c) Providing specific, statutory exemptions in the District of Montreal (sec. 339, 1934 C.S.A.).
- (d) Providing the Pilotage Authority of any District with the power to compel the Customs officer of any port in Canada to withhold the clearance of a ship owing pilotage dues (subsec. 336(2), 1934 C.S.A.).

In résumé, the 1934 Act (i) retained all the features of the basic organization of the 1873 Act; (ii) deleted almost all of what still remained of the special organization provided in the 1873 Act for the Districts of Quebec, Montreal, Halifax and Saint John; (iii) omitted many statutory provisions that were thought no longer applicable, such as the right to administer oaths; (iv) transferred other responsibilities to the Pilotage Authorities to be dealt with under their regulation-making powers.

AMENDMENTS 1934-1952

Before the 1934 Act came into force August 1, 1936, it was amended earlier in 1936 by 1 Ed. VIII c. 23 (vide House of Commons Debates 1936, Bill 53). The two main amendments were:

- (a) Each pilot's civil liability "for any damage or loss occasioned by his neglect or want of skill" was limited to the amount of \$300.
- (b) The regulation-making powers of the Pilotage Authority with respect to discipline of pilots were enlarged, *inter alia*, by downgrading some offences from statutory offences to by-law offences if the Pilotage Authority saw fit to so legislate, for instance, for a pilot to pilot while suspended or while under the influence of intoxicating liquor, for refusing to take charge of a ship when required by a Master, by an officer of the Pilotage Authority or by any chief officer of Customs.

In 1938, by 11-12 Geo. VI c. 35, the indemnity for pilots carried beyond the limits of their District or detained in quarantine was raised from \$3 to \$15 per day.

In 1950, 14 Geo. VI c. 26 made four important amendments:

- (a) The Quebec Pilots' Corporation was deprived of the trusteeship and administration of the Decayed Pilot Fund and the Pilotage Authority was made responsible as in the other Districts. (In 1947, the Audette Committee had found the Quebec Pilot Fund in a deplorable state.) These provisions, however, were not to come into force until proclaimed by the Governor in Council. Up to the present this proclamation has not been made.

- (b) Subsec. 337(a) was expanded to include the requirement of giving reasonable notice of expected time of arrival of a non-exempt ship on her inward voyage if she was to be excused from paying pilotage dues because no licensed pilot offered his services.
- (c) The statutory exemptions were re-drafted, the special exemptions for Montreal were deleted and the right to vary certain of these exemptions was extended to all Districts without exception.
- (d) The Pilot Funds, in Districts where the Minister was the Pilotage Authority, were entrusted for administration to the Ministers of Transport and Finance, and this privilege was extended to the other Pilotage Districts if they so elected and if approval was granted by the Governor in Council.

CANADA SHIPPING ACT 1952

As far as pilotage legislation was concerned, the 1952 Canada Shipping Act (1952 R.S.C. c. 29) was merely another consolidation.

AMENDMENTS 1952 TO DATE

The Canada Shipping Act has been amended three times since 1952:

- (a) In 1956 (4-5 Eliz. II c. 34) there were three minor amendments:
 - (i) The limit on the minimum duration of a licence that a Pilotage Authority had power to prescribe by by-law was deleted from subsecs. 329(o) and (p).
 - (ii) The rule prohibiting the use of a non-licensed pilot in a Pilotage District was elaborated in subsec. 354(3).
 - (iii) Subsec. (2) of sec. 357, which had confirmed the right of the Montreal pilots to finish or commence their river trip in the Harbour of Quebec, was deleted. In its place a provision applicable to all Districts was added authorizing the Pilotage Authority to provide by by-law that a "move" by means of a ship's mooring lines would be subject to the compulsory payment of dues.
- (b) The 1960 amendment (8-9 Eliz. II c. 40) established a special system of pilotage on the Great Lakes (Part VIA and sec. 356A).
- (c) In 1961 (9-10 Eliz. II c. 32) the penal sanction for employing an unlicensed pilot was increased (sec. 356) and an exemption was provided for American ships while proceeding through any of the St. Lawrence River Pilotage Districts above Montreal if their operations are primarily on the Great Lakes and the St. Lawrence River, even if they make occasional voyages to ports in the "maritime provinces of Canada" (subsec. 346(ee)).

PILOTAGE LEGISLATION ADDITIONAL TO C.S.A. STILL IN FORCE

At present, the only legislation affecting pilotage is supposed to be contained in the Canada Shipping Act but the following legislation additional to C.S.A. appears to be still in force.¹

- (a) The Pilots Corporation Act of 1860 (23 Vic. c. 123) as amended in 1869 by 32-33 Vic. c. 53 (both reproduced in 1887 after the 1886 consolidation in a volume titled *Acts of the Provinces and of Canada not Repealed by the Revised Statutes* at pages 323 and 739), in 1899 by 62-63 Vic. c. 34 and in 1914 by 4-5 Geo. V. c. 48 (which last Act was repealed by the 1927 C.S.A.). The non-repealed part of the 1860 Act concerns the formation of the corporation of which all Quebec pilots are automatically members and which is still operating for the sole purpose of acting as trustee and administrator of the Quebec Decayed Pilot Fund pursuant to the powers inherited from Quebec Trinity House in 1875 by 38 Vic. c. 55. Sec. 32 which grants a Master the right to choose his pilot on the downbound voyage and secs. 2-3 of the 1869 Act which reaffirmed this right and extended it to the upbound voyage have not been repealed. It could be argued that these provisions have been indirectly repealed by the 1914 Act in that the privileges they approved were accessories to repealed corporation powers over despatching.
- (b) There is also the Corporation of Pilots for and above the Harbour of Quebec which was incorporated as a public corporation in 1850 (13-14 Vic. c. 123) and amended in 1853 (16 Vic. c. 258). The corporation never became operative, the pilots having refused to attend the necessary first meeting (vide Montreal History Notes). The last mention of this Act is contained in the schedule of the 1859 consolidation of the Province of Canada Statutes where the letters L.C.P.L. indicate why the Act was not incorporated in the revised statutes: these letters mean "Lower Canada, Private, Local". Thereafter, no further mention of this Act is to be found.
- (c) The Quebec Trinity House Act of 1849 (12 Vic. c. 114) was completely repealed by 57-58 Vic. c. 48 in 1894 but some of its provisions continued to apply through the 1875 Act (38 Vic. c. 55) which merely enacted that the Quebec Pilots' Corporation would succeed the defunct Trinity House with respect to the trusteeship and administration of the Decayed Pilot Fund because it continued to be governed by the specific provisions contained in the Trinity House Act.

¹There may also be a number of sundry provisions in other areas of pre-Confederation legislation that deal specifically with aspects of pilotage, and these may still be in force provided they have not been indirectly repealed by the enactment of incompatible federal pilotage legislation. One example is subsec. 2383(2) of the Quebec Civil Code which provides a maritime lien and a privilege upon vessels for pilotage claims.

Chapter 2

EXISTING PILOTAGE LEGISLATION

1. EXTENT OF PILOTAGE LEGISLATION

Since pilotage falls within the definition of “navigation and shipping” it comes under the exclusive legislative authority of the Parliament of Canada (British North America Act, 1867, subsec. 92(10)). Most federal pilotage legislation is contained in Parts VI and VIA of the Canada Shipping Act (1952 R.S.C. c. 29 as amended). There are miscellaneous provisions in the Interpretation section of the Act (sec. 2); in Part VIII dealing, *inter alia*, with the powers and responsibilities of the Minister of Transport with respect to the safety of navigation; and in Part XV dealing with legal proceedings. Some pre-Confederation statutes that deal with limited aspects of pilotage are still in effect. They are covered in this Report where the peculiarities of the District to which they apply are studied, e.g. in the Quebec District, the Quebec Trinity House Act of 1849, the Quebec Pilots Corporation Act of 1860, etc. . . .

There is no limit to the extent of legislation that Parliament can enact ranging from simple rules to compulsory pilotage placed under the exclusive control and responsibility of the Federal Government.

Existing federal pilotage legislation covers three areas:

- (a) Legislative provisions affecting pilotage in general.
- (b) A scheme of organization to be applied when and where the Government may consider it to be in the interest of shipping to have the qualifications of the pilots controlled by a licensing authority.
- (c) Provisions of exception (Part VIA) which place pilotage service in the Great Lakes Basin under direct Government control.¹

There is one other area which is not covered by legislation, i.e., the Government, without specific enabling legislation, may enter the pilotage field by providing all or part of the service at certain places and under certain

¹ Part VIA is new legislation passed in 1960 (8-9 Eliz. II c. 40) to meet the particular requirements of the unusual situation which existed in the Great Lakes Basin and in the international portion of the Seaway after it opened in 1959. This “*sui generis*” type of organization is studied under Great Lakes Pilotage, Law and Regulations.

circumstances, e.g. by using its own employees to provide pilotage service. This intervention is not covered in the Canada Shipping Act and need not be because it is within the general powers of the various departments of the Federal Government to provide any service that is considered necessary in the public interest. If a service is provided in this way and if the Governor in Council is of the opinion that all or part of the cost should be borne by the persons to whom it is provided, the fee that may be charged is established in a regulation made by the Governor in Council pursuant to sec. 18 of the Financial Administration Act (1952 R.S.C. c. 116).

By resorting to this process the Government is in the same situation as any private citizen or private enterprise which offers a type of pilotage service such as exists at Port Cartier, Seven Islands, etc. The Government can not interfere with the right of any one, whatever his qualifications, to offer his services, no tariff is binding and the pilotage dues or remuneration for pilotage service becomes a matter of a private agreement between the ship and the pilot concerned or between the ship and the Government if the pilot is a Government employee. Failure on the part of the ship to pay dues does not make her liable to arrest under sec. 344 C.S.A. because there is no Pilotage Authority; the price for the pilotage is merely the monetary consideration of a private contract and the Government has no more right than any private citizen to enforce payment for any pilotage service rendered in unorganized territory (except for the ordinary precedence attached to a claim by the Crown).²

The fact that the cost is fixed by regulation changes neither the nature of the contract nor the situation. It is still a free agreement but the Crown's representative is bound by the fee prescribed in the regulations while the other party is at liberty to choose whether he will use the service at that price. Furthermore, Masters are not bound to employ D.O.T. pilots but may proceed without a pilot or may hire anyone who happens to offer his services as a pilot.

This type of service is usually provided by the Government where it is in the public interest to provide reliable and adequate pilotage service and where the requirement can not be adequately met by the creation of a Pilotage District under Part VI. This situation prevails at Goose Bay where, on account of its remoteness, no qualified pilots can be found in the vicinity

²Sec. 5 of the Goose Bay Pilotage Regulations (P.C. 1960-615 dated May 5, 1960, Ex. 1200) provides for the withholding of a ship's clearance in any Canadian port at the request of the Minister of Transport if dues for services rendered at Goose Bay are outstanding. There is no statutory authority for such a provision when contained in regulations passed under the Financial Administration Act (sec. 18); Sec. 344 C.S.A. can not apply because Goose Bay has not been enacted as a Pilotage District under Part VI of the Canada Shipping Act. The Department of Transport has been unable to point out any legislative provision authorizing such an extraordinary procedure to enforce payment of such a debt to the Crown. (Vide D.O.T. letter dated September 8, 1966, Ex. 1487).

and where, because of the short navigation season, it is impossible to provide remuneration that would induce qualified pilots to offer their services if the dues were maintained at a reasonable level. When all the traffic is for one organization the initiative and cost of providing pilotage are normally assumed by that group, e.g. the pilot who was employed by the American Air Force authorities at Harmon Field, Stephenville, Newfoundland, to handle the ships which called at their private port. If there is more than one interested party, and especially if one is the Canadian Government, a service provided by the Government is indicated. The scheme of organization envisioned under Part VI C.S.A. is based on free enterprise and if it is to be workable the conditions must be such as to assure the pilots a reasonable income from pilotage. In spite of the fact that these conditions could not be met at Churchill, a Pilotage District was organized with the result that an awkward situation was created (vide Churchill Pilotage District).

If the Government provides a pilotage service performed by its employees, it becomes responsible (within the qualifications contained in the Crown Liability Act (1-2 Eliz. II c. 30 and the Exchequer Court Act (R.S.C. 1952 c. 98)) for the damages caused by the act or omission of these employees. This situation does not exist under Part VI of the Canada Shipping Act because the power of the Crown's officer, i.e., the Pilotage Authority, is limited to licensing pilots.

The Government has also intervened beyond the limits of the legislation in force to provide service in organized territories either through the Pilotage Authority itself or through the Department of Transport or a Crown Agency. The Government provides the service in one of two ways: first, partially, by providing pilot vessels; second, on a more complete scale, by entering into pilotage contracts with owners and hiring employees to provide service. (The legal situation thus created is studied later in Chapter 3 "Pilotage Organization under Part VI" and Chapter 8, pp. 237 and ff., "Nature and Powers of the Pilotage Authority".)

2. GENERAL LEGISLATIVE PROVISIONS

There is nothing to prevent Parliament from passing legislation of a general nature affecting pilotage, such as creating special types of offences in the exercise of pilotage or enacting provisions that would affect all pilotage contracts. Has Parliament made use of this power and are any sections of the Canada Shipping Act applicable outside as well as inside Pilotage Districts and the Great Lakes Basin?

Prior to studying this question, it is pertinent to establish the scope of existing legislation by ascertaining the meaning that the legislature has given to the term "pilot".

(1) MEANING OF THE TERM "PILOT"

Semantics play an essential part in providing a clear understanding of the principles laid down in the Canada Shipping Act for regulating pilotage. In this Act, as in any legislation, the meaning of every term, every expression should be clear, constant and unequivocal.

According to the rules of interpretation, terms and expressions used in a piece of legislation are to be construed in their ordinary, common meaning as defined in the standard dictionary except when a special definition is contained in the legislation, either in the Interpretation Act or in the Interpretation section of a specific Act. When this is done, it is the sense as extended or as restricted by the specific definition that is to be used whenever the word, the term or the expression is found in the Act concerned.

One word that requires accurate definition is "pilot" because the meaning accepted will be one factor that will determine the purpose and scope of legislation in the pilotage field. This was realized from the beginning and the word was defined in the very first pilotage legislation passed in Canada after Confederation: section 2 of the 1873 Pilotage Act contained exactly the same definition as the 1952 Canada Shipping Act.

This definition (subsec. 2(64), C.S.A.) reads as follows:

"(64) "pilot" means any person not belonging to a ship who has the conduct thereof."

Pre-Confederation pilotage legislation contained no such definition. Its origin is the 1854 Merchant Shipping Act of the United Kingdom (Ex. 1482) where it is found verbatim. There also it has since remained unchanged and is now sec. 742 of the existing Merchant Shipping Act.

In statutory definitions when the verb "include" is used, it is to add something to the normal meaning by way of extension. Conversely, however, when the verb "mean" is used, it is to restrict the general sense to what is described in the definition. Hence, when a definition is restrictive, the meaning of the term can not be extended beyond the meaning of the components of the definition.

The statutory definition of "pilot" is not its natural definition but a restrictive one for the sole purpose of indicating the special sense in which the term is being used throughout the Act. Therefore, great care ought to be taken when comparing the Canada Shipping Act with foreign legislation and even with other Canadian legislation in which a different meaning is adopted. For instance, this was a cause of much confusion when the Canadian and American governments studied their joint pilotage operations in the Great Lakes Basin and considered the type of pilotage organization that ought to be adopted in the legislation of both countries. Where in the U.S.A. Act of 1871 it is required that "every coast-wise sea-going steam vessel

subject to the navigation laws of the United States, not sailing under register, shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the Coast Guard” (46 U.S.C. 364)(R.S. 4401). This means, *inter alia*, that a ship may be navigated by one of her own officers provided he is qualified for the navigation of the American waters where the ship is being navigated, i.e., is a pilot for these waters. (Ex. 1103, Hearings on U.S.A. Great Lakes Pilotage Bill H.R. 57 (1959) pp. 24-25).

(2) STATUTORY DEFINITION

This is composed of two elements:

- (a) having the conduct of the ship, that is, the action of navigating the ship;
- (b) not belonging to the ship, that is, the relationship towards the ship.

The expression “having the conduct of the ship” is not defined and, therefore, it should be construed in its normal meaning, that is, to have charge and control of navigation; in other words, of the movement of the vessel. Hence, the substantive “pilot” is synonymous with “navigator” and the verb “to pilot” is equivalent to “to navigate”. It is the unofficial practice aboard naval vessels to refer to the officer in charge of navigation as the pilot, even though this officer is one of the normal complement of the ship. It is worth noting that in the Rules of the Road for the Great Lakes of 1954 (P.C. 1954-1927) passed at a time when there was no organized pilotage in the Great Lakes Basin, the term “pilot” is given its natural sense and is used throughout to refer to the navigator of the ship whoever he may be.³ Section 1(b) reads as follows:

“(b) ‘pilot’ includes the master, officer or other person in charge of the navigation of a vessel.”

The verb “to pilot” and the noun expressing the action of piloting, i.e. “pilotage” are synonymous with “to navigate a ship” and “the action of navigating a ship”. It is the sense of the first component of the definition. This clearly appears by the way these two terms are used throughout the Canada Shipping Act. For instance, Parts VI and VIA deal with pilotage in its general meaning and not merely as related to the action of pilots in the limited sense of the definition. These parts deal with all those who may take charge of the navigation of a ship (which includes pilotage) even though they are not pilots, namely, under certain circumstances, the Masters and mates who are granted pilotage certificates (subsecs. 329(d), (e) and (f)), and “B” licences (sec. 375B) which entitle them to pilot their own ships.

³It is a questionable drafting practice to make a legislative definition by regulation of a term already defined in the governing statute, especially when, as in this case, the two definitions do not agree.

The context of the Act also clearly indicates that the expression "having the conduct of the ship", which occasionally is replaced by having the "charge" of the ship (subsecs. 368(c), 329(f) and 340(3)), refers only to the actual act of navigation, *inter alia*:

- (a) By the definition of "master", which excludes the pilot from those who may be in command of a vessel (subsec. 2(52)).
- (b) In subsec. 329(f)(vi), the verb "to conduct" is applied to the act of navigating a ship, in that it may be made a breach of regulations for a pilot to refuse, "when requested by the master to conduct the ship . . . into any port or place into which he is licensed to conduct the same".
- (c) A consequence of the wording of subsec. 647(1), as amended, is that a licensed pilot is not responsible for the application of the Collision Regulations unless he is a "pilot", as defined in the Canada Shipping Act, that is, that he has the conduct of the vessel.
- (d) It is only if a licensed pilot has continued to navigate beyond the limits of his District that he is subject to the disciplinary regulations that may be passed under subsec. 329(f)(iv).

Therefore, to be a pilot as defined in the Act is not a question of qualification, profession, certificate or licence; it is the fact of actually navigating a vessel (and not of being capable or authorized to navigate a vessel). A pilot, whether licensed or not, ceases to be "pilot" when, for any reason, he is superseded by the Master or by the person in command. Similarly, if anyone is merely used as an adviser and is not entrusted with the navigation of the ship, he is not the pilot of that ship. Therefore, the general provisions concerning pilots do not apply to him under such circumstances.

The first component of the definition is, therefore, the ordinary sense of the term, i.e., the person who at a given moment is navigating the ship is the pilot at that time. It is by the second component of the definition that the legislature has restricted the general meaning of the term to those navigators who are not part of the normal complement of the crew. Therefore, a "pilot" as defined in the Act in addition to navigating a ship, must also be a stranger as far as that ship is concerned.

The expression "belonging to a ship" is not defined doubtless because the term is not ambiguous to a mariner. The verb "to belong" connotes permanency and also service to a ship. In other words "to belong" means to be one of what is normally referred to as the complement of a ship, i.e., "the full number required to man it" (Oxford Dictionary). This comprises the ship's Master, mates, engineers and crew, all those aboard whose relation to the ship's authority is one of master and servant, and who have entered into a contract of service on board the ship.

Therefore, because of this definition neither the Master nor any member of a ship's crew can be considered the pilot, despite the fact that he may actually be piloting the ship.

Whether or not a person belongs to a ship is a question of fact. If a ship uses articles, a seaman has to sign them in order to belong to the ship. In Canada all seamen who have signed the agreement specified in sec. 168 and ff., Canada Shipping Act, normally belong to the ship but documentary evidence is not complete proof in itself and may merely create a presumption in respect of third parties.

A subterfuge is sometimes resorted to when an unlicensed pilot is employed contrary to subsec. 354(3) Canada Shipping Act in Pilotage District waters by making him a member of the crew in a technical sense for the duration of his pilotage throughout the District. This "Sailing Master", as he is often called, is taken off the articles when the transit is effected, only to be re-enrolled aboard another ship for the same purpose. (Vide Quebec District, *Nature of Pilotage Service*).

(3) CONSEQUENCES OF DEFINITION

- (a) The definition of the terms "pilot", "licensed pilot" and "unlicensed pilot" is not based on the same concept. In the Canada Shipping Act, "licensed pilot" is defined from an altogether different point of view than "pilot". If this is not clearly understood, confusion may result. The definition of "licensed pilot", as will be seen later, refers to the legal capacity of a person in a Pilotage District to enter into a contract for pilotage while, as seen above, the term "pilot" when taken alone means the legal status of a man at the moment he is engaged in the navigation of a ship and only then. The term "registered pilot" means the same as "licensed pilot", but only in the Great Lakes Basin and not in the other Pilotage Districts. Therefore, the fact that a person makes it his profession to pilot vessels, whether or not he is licensed or registered, does not make him a pilot within the meaning of the Canada Shipping Act, for instance: whenever his services have not been accepted; when his services have been accepted but he has not been placed in charge of navigation; when he is superseded by a Master or other officer representing a Master; when he has completed an assignment; when he is used as an adviser and has not the conduct of a vessel.
- (b) The definition of pilot does not convey in itself a question of territoriality or of local knowledge: all that is needed is to be a person not a member of the ship's crew and to be put in charge of its navigation anywhere, on the open seas or lakes or in the confined

waters of a river or a harbour. It is only in the concept of licensed and registered pilots that the prerequisite of local knowledge or of a special skill necessarily arises.

The fact that the question of territoriality does not affect the definition of pilot is apparent from subsec. 333(3) which stipulates that a licensed pilot who navigates a ship beyond the limits of his District does not cease to be a pilot for that reason, but is merely "considered an unlicensed pilot". A British Columbia pilot continues to be the pilot of the ship whenever he has charge of her navigation whether he is in American waters, as happens whenever he sails through Haro Strait, or outside District limits, as may happen along the B.C. coast, e.g., between McInnis Island and Cape Beale.

- (c) The statutory definition of "pilot" neither includes nor even implies the possession of any special qualifications, skill or knowledge. The present legislation is not concerned with the skill and competence of persons acting as pilots outside Pilotage Districts and the Great Lakes Basin and even in those areas if Masters hire unlicensed or unregistered pilots. It is then incumbent upon Masters to act with prudence and care before entrusting the navigation of their ships to others.
- (d) "To conduct a ship" must not be confused with being "in command of a ship". The first expression refers to an action, to a personal service being performed; the second to a power. The question whether a pilot has control of navigation is a question of fact and not of law. The fact that a pilot has been given the control of a ship for navigational purposes does not mean that the pilot has superseded the Master. The Master is, and remains, in command; he is the authority aboard. He may, and does, delegate part of his authority to subordinates and to outside assistants whom he employs to navigate his ship, i.e., pilots. A delegation of power is not an abandonment of authority but merely one way of exercising authority. The Master always retains legal control, legal command, of his ship; it is only a *de facto* responsibility or control which he has entrusted to the pilot and which he can qualify or withdraw at will. When a Master makes one of his mates responsible for the conduct of his ship he has not abandoned his command although the mate has been placed in temporary charge of the navigation. In both cases, the pilot and the mate are actually responsible for navigation, both have to obey the Rules of the Road and the Collision Regulations. Any failure in the discharge of their duties involves their personal responsibility. Under Canadian legislation, the Master never relinquishes responsibility (that is, his duty) for the safety of his ship. The pilot's instructions are carried out with

the Master's authority. The pilot can not legally command the crew. The Master or his representative, i.e., the ship's officer in charge of the bridge, must supervise the pilot's instructions and warn him about any peculiarities of the ship that may affect her movements and also, together with the pilot, must make sure that instructions are promptly and correctly followed. A pilot's order transmitted to the wheelsman, which is not properly executed, involves the personal responsibility of both the pilot and the officer of the watch.

When dealing with this question, confusion is caused by the dual meaning of the word "responsibility". There is first the responsibility of the Master for the safety of the ship that is dealt with above. It is a duty which is discharged, *inter alia*, by hiring the assistance of a pilot, by supervising his navigation and by giving him whatever information and assistance he may need. There is also the responsibility of the Master in the sense of liability, which is discharged, in the case of civil liability, by paying the damages.

While the Master always retains his responsibility for the safety of the ship, his responsibility in the sense of liability is not absolute. Either civilly, criminally, or with respect to the safety of navigation, he is answerable only for his own acts, mistakes, negligence or omissions. At civil law, he is merely a servant of the owner and he does not incur personally any civil responsibility for any damage caused by a pilot's error in which he did not participate or which he could not have prevented. The same principles apply, with varying degrees of onus, to his criminal liability and his responsibility for safety of navigation. For instance, under Part VIII of the Canada Shipping Act, the certificate of the Master should not be cancelled or suspended if a shipping casualty was caused by the sole fault of a licensed pilot. The Master, however, would be considered blameworthy if it was established that his personal negligence contributed to the casualty. It has been found repeatedly that both Masters and pilots were equally to blame because the Collision Regulations were not followed, such as excessive speed during low visibility, failure to sound signals, etc., all matters that could not have passed unnoticed by the Master. (Vide District of Quebec, *Shipping Casualties*.) A Master would also be negligent if he entrusted the conduct of his ship to a pilot he had reason to believe was not in fit condition to pilot.

It would be negligence on the part of a Master "to get rid of" his responsibility by entrusting the navigation of his ship blindly to

a pilot. He personally or through his officers should always remain in command and supervise the pilot's actions. The pilot is not, and should never be, the "officer of the watch".

The situation remains the same on the designated waters of the Great Lakes Basin where pilotage is compulsory. A "vessel", if not exempted, can not be operated unless she is piloted by a registered pilot (sec. 375B C.S.A.). In other words, the pilot must be in charge of navigating the ship, but the Master remains in command, tells the pilot where he wants to go, when to depart and when to arrive. The pilot's orders are carried out with the authority of the Master. The pilot has no right to give orders to the crew. Only a registered pilot may navigate the ship but the Master retains the right to intervene and even to discharge the pilot, in which case the ship must be stopped as soon as this can be safely done. The Master must always co-operate with the pilot by advising him of the particulars and peculiarities of the ship. The Master retains responsibility for his ship and it is his duty to prevent a pilot from doing something he believes to be wrong which would endanger her safety. He must not allow a pilot to continue to navigate if he realizes that the pilot is not fit to do so. This principle finds its authority in the exception of distress or of "circumstances necessary for the Master to avail himself of the best assistance that can be found at the time" contained in subsec. 375B(4)(b), C.S.A.

With reference to the civil liability of the owner, it is possible that he should not bear responsibility for the errors of a pilot who holds the status of an independent contractor, but the question is academic now, at least under Part VI, C.S.A., because of subsec. 340(3) which renders the owner or Master responsible for damage or loss caused by a licensed pilot. This provision does not apply to registered pilots and Part VIA does not contain any similar provision. Because of the different relationship that exists under Part VIA, the question is studied in the Law and Regulations section of Great Lakes Pilotage, but it is pertinent to take note here of the judgment which the Vice-Admiralty Court, Lower Canada, rendered in 1861 (11 L.C.R. 342 in re: *The Lotus*, Clark) on the damage suit brought against the vessel *The Lotus* by the owners of the ship *Washington*. *The Lotus* while in charge of a branch pilot had dragged her anchor and caused a series of collisions with other vessels at anchor. The Court found that the pilot was solely to blame and dismissed the action v the owner because pilotage had been made compulsory in the Port of Quebec. The Quebec Trinity House Act, as amended, obliged the Master to take a pilot and to

give him charge of his vessel and made it unlawful to refuse to do so. The judgment pointed out that the plaintiff had recourse against both the pilot and the Quebec Pilots' Corporation, citing an English decision:

"When the appointment (of pilots) rests with the owner himself, as in the case of the Master and crew, it is reasonable that he should be held responsible for their acts, who are agents selected by himself; and he is bound to provide persons with adequate skill, diligence and sobriety. But where a person is compulsorily put on board a vessel, and the owner's authority is superseded by legislative enactment, it would be a violation of all justice to hold such owner responsible for the skill, sobriety and caution of an individual with respect to whom he has no power of selection; whose qualifications he has no opportunity of deciding upon, but which are to be ascertained and determined by others; the owner himself being entirely debarred from any responsibility of interference."

There is nothing, however, to prevent the legislature from intervening further by passing appropriate legislation—even depriving the Master of his legal command over the navigation of his ship for the duration of a pilotage trip by imposing compulsory and absolute pilotage. Such legislation amounts, in fact, to an undertaking by the Government concerned to assume responsibility that a ship will transit a given pilotage area and will be returned safe and sound to her Master at the end of the trip. In the Panama Canal, where this situation obtains, the Canal Authority helps to meet its obligation by providing helmsmen, linesmen and the necessary special equipment. Subsec.9.1 of the Rules and Regulations Governing Navigation of the Panama Canal deals with the Canal Authority's responsibility which is a necessary consequence of such compulsory pilotage (Ex. 496):

"9.1 The Panama Canal Company shall promptly adjust and pay damages for injuries to vessels, or to the cargo, crew, or passengers of vessels, which may arise by reason of the passage of such vessels through the locks of the Panama Canal under the control of officers or employees of the said corporation . . ."

- (e) The nature of the contractual relationship between the Master and the pilot is not taken into consideration in the statutory definition of the term "pilot". All that the law aims to cover is the actual performance of navigation by a "person not belonging to the ship". This contractual relationship may take various forms. Although the pilot is usually an independent contractor, there are numerous other possibilities including: (i) being employees of the owner and serving more than one ship, like the two Canada Steamship Line pilots, the brothers Desgroseillers in the Kingston and Cornwall

Districts; (ii) being employees of a corporation or of a third party which leases their services like the Quebec pilots under the Quebec Pilots' Corporation system from 1860 to 1915 or the company pilots at Seven Islands, Port Cartier, etc.; (iii) being civil servants, as at Goose Bay and in Great Lakes Districts Nos. 2 and 3; (iv) being independent contractors but under a private partnership agreement like the river pilots in the Quebec and Montreal Districts.

(4) NECESSITY FOR A STATUTORY RESTRICTIVE DEFINITION OF "PILOT"

This arose when legislation was drafted to enable the Government to control the qualifications of pilots, to enforce the rules applicable to pilotage contracts and to administer public, organized pilotage, etc., e.g. subsec. 354(3)(a) C.S.A., which prohibits an unlicensed person from acting as a pilot in any Pilotage District except as therein provided. It is a controversial question whether or not in the Canada Shipping Act the legislature has passed general provisions which are applicable in all cases, i.e., whether pilotage is performed in a Pilotage District or in the Great Lakes Basin or elsewhere. This is studied under "Other Provisions of General Application".

(5) THE FACTS

The evidence presented before the Commission has established that when Masters employ a pilot it is their practice to entrust him with full responsibility for navigation. Masters very seldom interfere with a pilot's orders except on the rare occasion when it appears that the pilot is not physically fit. Some Masters allow the pilots to do all the navigating but take charge of berthing. Hence the factual situation corresponds with the statutory definition of "pilot".

The pilots in British Columbia told the Commission that they do not consider themselves in command of a ship, but they are, *de facto*, in charge of navigation from the moment they embark until they reach a safe anchorage or the next port. When a pilot boards a ship he meets the Master who normally lets him take over without delay if the ship is under way or when the time comes to sail if the ship is at anchor or in harbour. The pilot gives orders directly to the helmsman and passes orders to the engine-room through the officer of the watch. The pilot does not act as an adviser to the Master but actually navigates the ship. In point of fact the Master is then, to a certain extent, an adviser to the pilot when he points out the peculiarities of the ship. However, the Master always remains in command and closely supervises the pilot's performance. The late Captain W. A. Gosse added that in his 26 years of service Masters always gave him complete responsibility for navigation (B.C. District, *Pilots' Status*).

Similar evidence was received in all Districts and even from areas where pilotage was privately organized. It is disturbing to realize that the Prince Edward Island pilots do take charge of navigation, berthing and unberthing although they are not qualified mariners. Because it appreciates the situation, the Prince Edward Island Pilotage Authority has requested its pilots to warn Masters about their limited qualifications. Nevertheless, Masters continue to entrust them not only with navigation throughout the pilotage waters of the District but with berthing as well (vide P.E.I. District, *Limited Skill of Pilots and Recruiting and Qualifications of Pilots*).

This factual situation which corresponds to the legal definition of "pilot" is, in fact, the only realistic solution because, if pilots were used merely as advisers, navigation would be very hazardous and, at times, it would be impossible to proceed safely. For instance, there is no time for advice, consultation and deliberation when a supertanker is brought into the Courtenay Bay approach channel (Saint John, N.B.) or when a larger ship is brought down from Fraser Mills through the New Westminster Railway Bridge. The St. Lawrence pilots, in their brief (Ex. 671), quoted from a speech made in 1957 by Mr. J. T. Behan, a member of the Canadian Association of Marine Underwriters, when he said:

"the name of St. Lawrence, to the underwriter, evokes a picture of one of the most hazardous navigation routes in the world".

And he added:

"The difference is that navigation in the St. Lawrence allows for no second guessing. The first course a ship is committed to is frequently the last. If bad judgment has been used, the result is inevitable and swift".

(6) FOREIGN LEGISLATION

The legislation of most countries recognizes the realistic situation that there is not time for advice, consultation and deliberation between the pilot and the Master and that the pilot must navigate the vessel himself. How this situation is covered in legislation is a question of semantics, for example:

- (a) In the State of South Australia, where pilotage is compulsory (shall on demand by the pilot give the ship in charge of the pilot), the authority of the Master is recognized. Section 114 of the Harbours Act 1936 (Ex. 893) reads as follows:

"114(1) The duty of a pilot shall be to pilot the ship subject to the authority of the master, but the master shall not be relieved, by reason of the ship being under pilotage, from responsibility for the conduct and navigation of the ship.

- (2) The owner or master of a ship navigating under circumstances in which pilotage is compulsory shall be answerable for any loss or damage caused by the ship or by any fault of navigation of the ship in the same manner as he would if pilotage were not compulsory."

- (b) The Greek Pilotage Act (Ex. 888, sec. 17) is to the same effect:

“Sec. 17. The presence of a pilot aboard shall not relieve the Master of the ship of his responsibility nor is he prevented by the presence of the pilot from navigating or manoeuvring the vessel as he thinks best.”
- (c) The Danish legislation puts the pilot in charge of navigation but clearly indicates that he is not in command of the ship by saying, in subsec. 25(2) of the pilotage legislation (Ex. 889), that “the pilot has no right to command the ship’s crew but if the person in command does not carry out with the necessary speed the pilot’s demands in regard to navigation or manoeuvring the pilot is without responsibility.”
- (d) In Sweden the rôle of the pilot is not to advise the Master but to give him “instructions . . . which are necessary for the safe delivery of the vessel and also to make sure that his instructions are correctly understood. The pilot must direct his instructions to the helmsman or other member of the crew unless the master should object to this. The master is responsible for the manoeuvring of the vessel”.

In some countries “pilot” is defined as “licensed pilot”, thereby necessarily limiting the scope of legislation to a publicly controlled pilotage service.

This is the case, *inter alia*, in West Germany and Norway. In West Germany, sec. 1 of the Pilotage Law (Ex. 877) reads as follows (translation):

“Pilot in this Act means the person who, with the authorization of the Authority, navigates professionally ships on lakes and maritime lanes outside harbours as a specialist in navigation and in local knowledge. The pilot does not form part of the ship’s crew.”

The French legislation does not define the word “pilot” but his function, that is, “pilotage”. The definition reads as follows (translation) (Ex. 876):

“Pilotage consists of the assistance given to masters by personnel commissioned by the state for the conduct of ships in and out of harbours, in harbours, roadsteads, navigable rivers and canals”.

COMMENTS

1. The statutory definition of the term “pilot” should remain, in substance, unchanged. It is considered that it fulfills its purpose and is necessary in order to indicate exactly what is intended to be covered in legislation.
2. Its wording should be altered in the following respects:
 - (a) because the expression “the conduct of the ship” is ambiguous the intended meaning would be better rendered by:

- (i) indicating that only navigation is involved;
- (ii) replacing the controversial word “conduct” by “control”;
- (iii) adding “which function is exercised with the authority of the Master” in order to indicate (a) that the Master always retains legal command of his vessel and responsibility for her safety, and (b) the pilot is not subject to the Master’s direction for the manner in which his function is performed.

The amended version might read “the control of the navigation of the vessel which function is exercised with the authority of the Master”, or by phraseology to the same effect.

- (b) The expression “not belonging to the ship” should also be clearly defined. A provision should be included to the effect that a person shall not be deemed to have belonged to the vessel despite an entry in the articles or other documents if this person has not remained with the vessel throughout the full length of the trip or voyage, unless it is established that the engagement as a member of the crew was bona fide, the proof of which shall lie on him and on the vessel.

(7) OTHER PROVISIONS OF GENERAL APPLICATION

As seen above, the statutory definition of the term “pilot” enables Parliament to pass legislation of a general character applicable to all pilots whether they are licensed or registered or unlicensed, and whether pilotage takes place within organized territory—i.e., in a Pilotage District or in the Great Lakes Basin—or elsewhere.

In a number of sections of the Canada Shipping Act, the term “pilot” is used alone and, unless it is otherwise qualified by the text of the section, according to the rules of interpretation it must be given the full meaning of its statutory definition and, hence, the section concerned is of general application. There is, however, another possible interpretation, namely, that these provisions are limited by the context and that they have no application beyond the scheme of organization provided by this Part of the Act in which they are found.

These provisions are the following:

- (a) the definition of “pilotage dues” (subsec. 2(70)), i.e. “the remuneration payable in respect of pilotage”;
- (b) sec. 343 which makes the dues payable as a debt to the pilot or the Pilotage Authority as the case may be;
- (c) subsec. 362(1) concerning the set-off between the dues owned to a pilot and the damage caused by him to a ship;

- (d) subsec. 362(2) concerning the \$300 limit of civil liability for damage caused by the pilot's want of skill or neglect;
- (e) the statutory indemnity clause of sec. 359 for pilots carried to sea;
- (f) the statutory offence created by sec. 369 for endangering a ship or the life of persons aboard through the pilot's misconduct;
- (g) the statutory offence created by sec. 371 for any one to obtain or try to obtain pilotage of a ship through misrepresentation of circumstances upon which the safety of a ship may depend;
- (h) the jurisdiction of courts of formal investigation (sec. 560).

There are two aspects of the problem: first, in a Pilotage District do these provisions apply only to licensed pilots?; secondly, if not, do they also apply outside Pilotage Districts, i.e., to all pilots in Canada?

Reference the first part of the question, there can be no argument that the terms "pilot" and "licensed pilot" have two different meanings; not only is the latter restricted by a qualification but the legislature also took care to leave no possible ambiguity by providing a statutory definition for both terms, as seen above (subsecs. 2(64) and (44)).

There can also be no argument that the non-licensed pilot is recognized in Pilotage Districts for, in the exceptions set out in subsec. 354(1), he can legally act as a pilot and is then entitled to full pilotage dues (subsec. 354(2)). Why would he then incur more liability than the licensed pilot who was not available? The word "pilot" is used alone in subsec. 362(2) and, therefore, it must be given the meaning of the statutory definition (subsec. 2(64)). To substitute another definition would make the provision ambiguous and give a much more extended application. The provision refers to specific damage caused by a person not belonging to the ship when engaged in the act of pilotage and not to damage at large that might be caused at any time by a licence holder. If the limited interpretation, i.e., "licensed pilot", is given to this provision, it would make sense only if one assumes (which is not permissible) that the words "while acting as pilot" are implied.

It is not believed that such was the intention because, whenever a provision is to apply to a licensed pilot, it is clearly indicated. When the term "pilot" is used alone, it must be concluded that it was deliberately done and that unless the text of the provision clearly makes it applicable only to licensed pilots it must be taken as referring to all pilots.

It can not be concluded, by considering the whole of sec. 362, that the limitation of liability can not apply to the non-licensed pilots. Even the first subsection of sec. 362 deals with both situations. It provides for the set-off between the pilotage dues owed to the pilot and damage caused by his error. The expression "pilotage dues" does not necessarily refer to licensed pilots nor to tariff fixed by by-law. The term is defined, not in Part VI, but in the

Interpretation section of the Act (subsec. 2(70)) and in a very general way as meaning “remuneration payable in respect to pilotage”. To imply that it is as fixed by the Pilotage Authority is to add a restriction which is not in the text. The context clearly indicates that there may be other pilotage dues than those fixed pursuant to the provisions of Part VI (sec. 341). But even if it referred to the pilotage dues as fixed by the Authority pursuant to subsec. 329(h), unlicensed pilots are entitled to receive them in the circumstances described in sec. 354. Furthermore, subsec. 362(1) contemplates two cases where the set-off provision applies: (a) the licensed pilot whose licence has been suspended or revoked and (b) the pilot, licensed or not, who is condemned to pay a penalty⁴ for having caused damage to a ship. Sec. 371 C.S.A. (sec. 72, 1873 Pilotage Act) provides that an unlicensed person, who has obtained pilotage of a ship through misrepresentation of the circumstances upon which the safety of the ship depends, is liable to a fine not exceeding \$200, plus any liability in damages. It would be an improper restriction on subsec. 362(1) to claim that in such a case the set-off would apply only if the pilot is licensed.

There can be no argument whether sec. 371 applies to anyone, whether he is a licence holder or not, who acts, or who offers to act, as pilot because the section is specific on this point. In sec. 369, the general term “pilot” was used intentionally in contrast with sec. 368 where the series of offences is restricted to licensed pilots and apprentices. This is also borne out by the former legislation (sec. 71, 1873 Pilotage Act) where, as in sec. 371 of the existing Act, an additional punishment was provided when the pilot, i.e., the person who acted as pilot, held a licence.

The second part of the question is whether there is anything in these texts or in the context to justify limiting their application to those areas where the type of pilotage organization provided in Part VI, C.S.A., exists, that is, only within Pilotage Districts? In other words, is there anything in Part VI which applies where no Pilotage District exists, including the Great Lakes Basin?

Such a limited interpretation can result from an inference only because it is not stated anywhere in the Act but is merely implied from the order in which the sections concerned are placed in the text, i.e., Part VI, C.S.A., dealing with the organization of Pilotage Districts, must be taken as a whole and none of its provisions can apply except within a Pilotage District.

If such had been the intention, the most obvious means to convey it would simply have been to say so, first by restricting the scope of its title which is “Pilotage” and not “Pilotage in Pilotage Districts”, and second by

⁴ The word “penalty” here must not be given the restricted meaning that was introduced into the Act in 1934 (subsec. 329(g) and sec. 709) (vide C. 9, pp. 380 and ff.). This wording dates back to pre-1934 legislation when the word penalty was used to refer to any type of pecuniary penal sanction (vide sec. 43, 1873 Pilotage Act).

composing an appropriate, clear and unambiguous provision, rather than resorting to the tedious, dull, confusing procedure of repeating the same qualifying terms throughout the various sections, i.e., to say each time that a given provision is to be applied only if it is within a Pilotage District, such as sec. 352 re liability to pay dues to a licensed pilot taken voluntarily; sec. 354 re prohibition to employ an unlicensed pilot; sec. 361 re the right of a licensed pilot to quit a ship.

If sec. 359, which stipulated the remuneration to be paid a pilot who has been overcarried, is applicable to licensed pilots only, why is this not stated as is done in the next section regarding the quarantine allowance to which only licensed pilots are entitled? It must be because sec. 359 applies to both types of pilots. But why provide for two situations if only one situation in fact exists, because whenever a pilot is taken to sea, he must be taken beyond the limits of the District? If the legislation made a distinction it must have been because it was intended to cover two different situations, in one of which no Pilotage District existed. The wording of sec. 359 dates back to the 1873 Pilotage Act (sec. 40) and while it corresponds to sec. 357 of the 1854 Merchant Shipping Act of the United Kingdom, it also corresponds to sec. 14 of the New Brunswick 1861 pilotage legislation (24 Vic. c. 16) which applied to all pilots. The latter read as follows:

“That no pilot, except under circumstances of unavoidable necessity, shall without his consent be taken or carried to sea or to any place out of the Province and beyond the point or place to which his engagement or his duty shall require him to go”.

With such a restrictive interpretation, the result would be that none of the provisions of Part VI could be made applicable to registered pilots who are not also licensed pilots, e.g. they would not enjoy the \$300 limit of civil liability and the statutory offences of secs. 369 and 371 would not apply to them.

The word “pilot” is used alone in sec. 560 of Part VIII. According to the rules of interpretation, it should be given the meaning of its statutory definition. To hold that it refers only to licensed pilots is to restrict the scope of the term and to limit the jurisdiction of formal investigations. If the term was neither qualified nor restricted, it was because the legislature used it in its statutory meaning. To say that the Court of Formal Investigation has no jurisdiction to investigate the qualifications and conduct of a pilot unless he is licensed (because if he is not a licence holder, the Court would have no authority over him) is to misconstrue the main function of such a Court, which is above all a Court of Inquiry whose purpose is to find out the facts of a situation or a casualty, and only secondarily to deal with the licence of a pilot or the certificate of a Master, mate or engineer. Note should also be taken of the fact that a Master, mate or engineer does not necessarily hold a certificate (sec. 114).

Therefore, it is considered that these sections are legislation of general application and that they extend to all those who meet the statutory definition of pilot. However, the mere fact that such a long interpretation was necessary indicates that the matter is far from clear. Unless the intention of the legislature is clearly expressed, costly and unwarranted litigation will eventually take place.

COMMENT

It should be clearly indicated in the Act what provisions, if any, are of general application to every pilot, whether licensed, registered or not, and everywhere, in Pilotage Districts, in the Great Lakes Basin and elsewhere.

Chapter 3

PILOTAGE ORGANIZATION UNDER PART VI, C.S.A.

In Part VI of the Canada Shipping Act Parliament has defined in what way and to what extent the state may intervene in the exercise of pilotage as a profession in waters other than the Great Lakes Basin. The legislation does not provide for a nation-wide, centralized pilotage organization, nor is it stated under what circumstances it is considered in the public interest for the Government to intervene. The basic criterion is the convenience of shipping and the system is devised to keep state intervention at a minimum.

Parliament has restricted the Government's power of intervention to a bare minimum by retaining the free enterprise system with limited state control as the basis of the organization. The Government's powers and responsibilities with regard to pilotage are limited by legislation to deciding where and when to create and abrogate Pilotage Districts (except for the Districts of Quebec and Montreal where Parliament left the Government no discretion, by creating these two Districts and fixing their limits by legislation) and to fix and alter their limits, appoint and vary their Authorities and decide whether or not the payment of dues is to be compulsory. Aside from these powers, the Government has only indirect and secondary powers, that is, approval of by-laws and regulations and of certain other decisions made by Pilotage Authorities (the responsibility and initiative for which rest solely with the Pilotage Authorities), and a general duty of surveillance to see that the legislation in force is applied and respected.

Parliament has made independent local agents, ie., the Pilotage Authorities, responsible for seeing that pilotage service is provided in their respective Districts by a group of qualified, fit and reliable pilots who are in adequate numbers to meet the demand. The Pilotage Authorities are essentially licensing agents entrusted with the additional responsibility of providing by regulations the legislation which their locality requires. However, they have not been given the power either to control or provide pilotage service themselves or to participate in its management.

The legislation in Part VI is based on the free enterprise system where pilotage is provided by self-employed pilots acting as free contractors under local and independent licensing authorities.

PILOTAGE DISTRICT

The term "Pilotage District" is not defined anywhere but its meaning is apparent from the legislation. It must not be confused with the improper use of the term made in the regulations passed under Part VIA where it refers to special organizational structures which are applicable only in the Great Lakes Basin.

To those who employ pilots, Pilotage District means a defined and limited area within Canadian waters where pilotage service is provided under the jurisdiction of a Pilotage Authority.

From the organizational point of view, each District is a self-contained, independent, autonomous, self-supporting, decentralized unit under an agent appointed by the Government, who is called the Pilotage Authority, for the purpose of providing a designated area with an adequate number of duly qualified pilots.

A. ORGANIZED AND NON-ORGANIZED AREAS

The fact that pursuant to Part VI *licences can be issued in Pilotage Districts only* supports the view that controlled pilotage can not exist except within the limits of an organized territory, i.e., a Pilotage District, because only there can the capacity, fitness and reliability of a pilot be vouched for by a licence, and can persons deemed to be a safety risk be prevented from piloting.

On the other hand, in non-organized areas competent pilots may not receive any official recognition simply because the area where they exercise their calling is not within a Pilotage District. Unqualified and unreliable people enjoy equal rights to compete for employment by agents and Masters who normally have neither the means nor the opportunity to make a considered choice. The situation is clearly explained in a letter dated March 12, 1935, written by the Director of Pilotage in Ottawa in reply to a request for a pilot's licence for the port of Gaspé made on behalf of Mr. Norman Roberts (Transcript Vol. 3 C.D.H., p. 249).

"I have your letter of the 8th. instant, in which you advise me that Norman Roberts of Grande-Grève, Co. Gaspé, wishes to have a license for the port of Gaspé. I beg to advise you that there is nobody in Ottawa that has the authority to grant a pilot's license in a port, which is not within a pilotage district. The only authority that can grant a pilots' license is a pilotage authority for the individual district. However, there is no reason why Mr. Roberts should not continue to pilot, irrespective of having no license. All he has to do is to offer his services to any ship, and if the master of that ship requires a pilot, it is for him to accept or refuse Mr. Robert's services. If such services are accepted, it is for Mr. Roberts and the master of the ship to decide as to what remuneration he will receive for his services. It is quite in order for Mr. Roberts to advise masters of the reason why he is unable to obtain a pilot's license as given above."

Pilotage a Necessary Service

Pilotage is not an artificial creation but answers a definite need. The evidence received has demonstrated that it is the practice of all prudent mariners to make full use of local help whenever they have to navigate in confined waters with which they are not thoroughly familiar. They do this both for reasons of their own safety and to expedite their passage. This practice explains why pilotage service is provided wherever the traffic includes irregular traders, for example, (a) before private pilotage was arranged in the lower St. Lawrence ports outside the Quebec Pilotage District, Masters regularly employed Quebec District pilots to take their ships into these ports; (b) since Gaspé Bay is not difficult to navigate no official pilotage service exists but local fishermen are regularly used as pilots; (c) on the east coast of Newfoundland, which is not an organized territory, there is a constant demand for coastal pilotage which is mostly provided by off duty St. John's pilots; (d) the same situation prevails in the Strait of Canso where pilotage is performed mostly by off duty Bras d'Or Lakes pilots; (e) in Prince Edward Island ports, where navigational difficulties are almost non-existent and where the payment of dues is not compulsory, no ocean-going vessels ever proceed without a pilot and most of the large regular traders use them; (f) in all Pilotage Districts where the payment of dues is compulsory very few Masters of non-exempt vessels dispense with the services of a pilot and when they do so it is because they are regular traders who do not come under the prevailing scheme of exemptions; however, exempted ships frequently take advantage of the service, particularly when they do not follow their usual routes or when difficult navigational conditions prevail.

It is instructive to note the experience of the pilots in the British Columbia District where coastal and port pilotage have existed since early colonial days. After a revolt against the Pilotage Authority, the District was abolished in 1920, but ships continued to employ pilots although navigation in most British Columbia waters presented little difficulty to experienced Masters. When the District was created anew in 1929, the principal reason was not safety but merely the convenience of both Masters and pilots by stopping the bitter competition which had developed among the pilots' groups and which adversely affected all vessels not on regular runs, i.e., those that did not belong to a line trading regularly in the District. The payment of dues was made compulsory in 1949, not to force vessels to take pilots nor to enhance safety nor to improve finances, but only as an indirect means of solving the problem created by American pilots illegally piloting within B.C. District waters. The shipping interests were not concerned because they had always employed pilots.

The progressive electronic and other technical developments in the fields of navigation and communications have prompted a reassessment of future requirements for pilotage compared with today's needs. Such progress is evidenced by Brief No. 42, submitted by Computing Devices of Canada Limited, for an integrated navigation and traffic control system and also by the continuous studies now being undertaken and the active progress made by the Telecommunications and Electronics Branch of the Department of Transport.

What impact will such developments have on pilotage? Will it be doomed because it is replaced by a fully automated guidance system or will scientific progress result in placing at the disposal of the pilots instruments and aids to navigation which will enable them to make safe and speedy transits under the most adverse conditions?

In these days of scientific achievement, it is not unreasonable to believe that electronic instruments and computers could be devised to provide a reliable and safe system of automatic guidance for vessels through the most difficult of channels in any given area, thereby dispensing with the necessity for the services of a pilot. On the other hand, there is a limit to what is economically possible. No doubt, over large areas navigation could be substantially facilitated at a cost which would prove reasonable in comparison to the advantages gained by providing one-way channels, electronic guidance devices such as microwave beacons, radar, improved hyperbolic navigation units (DECCA), ship-to-ship and ship-to-shore radio telephone, traffic control, etc., thereby supplying the means for navigation to be safely performed by ships' personnel trained in the use of such devices. With all these arrangements, the services of a pilot could be dispensed with, for instance, in the main approach channels of most of our seaports and in the lower part of the Quebec Pilotage District. However, there will remain areas where the desired improvements would be so costly that they would be considered economically unfeasible when compared with the advantages gained. For example:

- (a) diverting the flow of the Saint John River to by-pass the harbour or to dredge Courtenay Bay approach channel to 35 feet at low water and to protect this channel from the flow of the Saint John River by the construction of a long breakwater;
- (b) straightening and widening the Fraser River channel;
- (c) twinning the channel between Quebec and Montreal;
- (d) constructing a new channel through the mud flats north of Orleans Island and thus making it a continuation of the North Channel as far as Quebec.

Until works of the foregoing magnitude are completed, if ever they are, pilots highly skilled both in local knowledge and in the use of modern navigational instruments will be necessary.

At this stage in our pilotage history there is no doubt that the single controlling factor is the assurance of the constant availability of highly qualified pilots. On the other hand, if methods can not be devised to assure stability in the service, to prevent the multiple causes of friction, disputes, frustration and dissatisfaction in the relations between pilots, shipping interests and Pilotage Authorities which eventually result in strikes by pilots, and if navigation in the area concerned is of vital importance to the economy of the country, then improvements, which may be very costly, are indicated, thereby minimizing the necessity for pilotage and the consequences of repeated or prolonged strikes.

Pilotage may be defined as the art of achieving the safe passage of a ship through confined and busy waters in the shortest possible time. Here, skill of a high order is needed. The pilot must know the ship's capabilities and limitations, the difficulties of the passage, including channel markers, tide, current and weather vagaries, etc. He must be skilled in the art of blind pilotage to a high degree if the ship is to make progress in inclement weather, or in conditions of heavy traffic density, and as is often the case, where many shore lights confuse the naked eye. He must be highly trained in the use of the various electronic and other devices, either shipborne or landbased, that are, or will be, made available to him. The trend is to larger and faster ships; their navigation creates problems which did not exist before, and their increasing number will create serious traffic problems in narrow and confined waters. Pilots with more skill and knowledge than they have today will be required to handle these ships expeditiously since all instruments and aids to navigation will be only as efficient as the men who use them. In the old days, it was said that pilots were lost when they could not see the land because they were then guided by landmarks and by their appraisal of ships' movements. Total darkness is still an appreciable hazard in channels that are lined by steep, mountainous terrain which casts dark shadows over the waters and where light beacons are infrequent. In these conditions there is great difficulty visually discerning where the sea ceases and the land begins. Such situations are encountered in the fiord-like channels of the B.C. Coast and in the Saguenay River. Pilotage in confined waters is essentially navigation by visual means, and until quite recently it came to a stop in periods of low visibility and very adverse weather conditions. With the aid of various electronic instruments, the pilot is now provided with means which are constantly being improved to "see" when visual means fail but this electronic "sight" has its limitations, and the images and information provided differ from what is seen with the naked eye. Therefore, to take advantage of these technical achievements, pilots must acquire the necessary knowledge and skill

to understand and use these instruments. The strange images that appear on the radar screen should be as familiar to the pilot as the land features in time of clear visibility and such local knowledge must form part of the qualifications of pilots today.

The rapid progress and changes in all navigational instruments necessitate a basic change in the system of licensing pilots. Formerly, changes happened progressively so that the necessary additional knowledge and skill were easily gained by experience but this is no longer true and additional theoretical and practical training will be necessary from time to time to make the pilot conversant with, and skilled in, the use of the new instruments. As will be seen later in Chapter 9, the present scheme of organization provided by Part VI of the Act does not give any control to the Pilotage Authority over the skill and qualifications of the pilots once a licence is granted. This omission should be corrected in future legislation.

The tasks to be performed by instruments become more and more complicated when a number of elements have to be taken into consideration at the same time, such variables as winds, currents, cross-currents, tides in restricted waters, various types of ships with different speeds and manoeuvrability factors and unforeseen events: all these are taken into account at the same time by the pilot. No instrument can fully replace the human element, i.e., the pilot, and none can have his versatility. Events can happen very quickly in confined waters that often require a split-second decision to avoid damage or disaster which can only be made by an officer on the bridge. If local knowledge and skill in navigation in the waters concerned are necessary, this officer is the pilot.

Responsibility for Choosing a Pilot

Throughout the shipping world it is the recognized privilege of the Master to take advantage of any available outside assistance when he feels it would add to the safety of his ship or would speed up the trip. The accepted practice is that the Master is entirely responsible for choosing and employing a pilot and for supervising him in the performance of his duties. This practice has been retained in Part VI, with the sole limitation that only licensed pilots may be selected (except in compulsory payment Districts for non-exempt vessels on the inward voyage, as will be seen later in C. 4, p. 70 and C. 7, p. 210).

In areas where pilotage service is not organized, Masters do not generally have either the means or the opportunity for making a considered choice. Usually they have no knowledge of the qualifications of those who offer their services and they have no way of ascertaining them. In the majority of cases it is impossible to arrange ahead for the attendance of a particular pilot whose qualifications are known and if the traffic reaches a certain density the complexity of the situation is compounded; a wrong choice may mean disaster.

The basic scheme in Part VI provides much assistance to Masters in the discharge of their responsibilities. The licensing of pilots is an official appraisal of their skill, knowledge and reliability; in addition, the regulations ensure that competent pilots are almost always available for vessels, whatever their size, type, flag or ownership.

Criteria for the Establishment of Districts

Except for the Districts of Quebec and Montreal, which Parliament established by legislation, the Governor in Council decides if the creation of a Pilotage District in a given area is indicated or not. The Act is silent as to the criteria upon which the Government is to base its decision but the legislation as a whole makes it clear that neither public interest nor safety of navigation is a consideration and that the aim is merely to help shipping in the difficult task of making the right choice of those who offer their services as pilots.

There is no provision in Part VI of the Act which compels a Master, whether Canadian or foreign, to turn over the control of the navigation of his ship while in Canadian waters (except the designated waters of the Great Lakes Basin described in Part VIA) to the specialist in local navigation who is available in each Pilotage District, thereby making navigation safer both for the vessel concerned and for others in those waters. There is nothing to prevent a Master from proceeding without a pilot through the most dangerous Canadian waters (except in the Great Lakes Basin, Part VIA) if he decides to proceed alone, despite the fact that no prudent and competent Master would normally do so. For example, there is nothing to prevent the Master of a supertanker, who is under pressure from either the owners, the agents or the cargo owners, from proceeding in the freshet season through Courtenay Bay approach channel (Saint John, N.B.) against the best advice of the pilots, thereby not only endangering the safety of his own ship but also running the risk of blocking the channel completely and closing part of the harbour. A similar situation could arise in the course of many difficult operations, e.g. proceeding without a pilot in the Fraser River pilotage area, in the St. Fulgence Channel, under adverse conditions in such dredged channels as the North Traverse or those between Quebec and Montreal, where a mishap could completely block navigation on the river concerned.

The rule is set out without any possible ambiguity in subsec. 340(1) C.S.A.: a Master is never obliged to give a pilot charge of his ship because "acceptance of pilotage is optional".

If it became apparent that compulsory pilotage ought to be imposed in a given area in the interest of navigation and of the public, or for some other compelling reason, this could not be done under the present Act because it would be a complete departure from the letter and spirit of the law, and new

legislation would be required, as was done in Part VIA in 1960 to cover the joint American and Canadian pilotage operations in the Great Lakes Basin. Part VIA is exceptional legislation, the application of which can not be extended outside the Great Lakes Basin.

It is apparent from other provisions of Part VI that the three main prerequisites for the establishment and the maintenance of a Pilotage District are:

- (a) the existence of a functioning pilotage service provided by pilots acting as free entrepreneurs;
- (b) a proven need for establishing a system of state control over the qualifications of the pilots;
- (c) a requirement by the shipping interests for pilotage.

The aim of the legislation is neither to create nor to organize a pilotage service but mainly to ascertain and guarantee the qualifications, fitness and reliability of those providing pilotage. Therefore, there must be a pre-existent service in which more than one pilot offers his services, which infers that there must be an adequate demand for pilotage. It is because these conditions do not exist at Churchill that this system can not work, and is not working, there. The Government acted wisely by not creating a District at Goose Bay. Both cases have similarities in that the demand for pilotage exists but there is no local person who offers, or is even capable of offering, to act as pilot. The problem was not to license pilots but to procure pilots and to provide the needed service.

The main condition, however, is that pilotage be required by the shipping interests. Since the aim of Part VI is to assist shipping, the convenience of shipping becomes the determining factor. The pilotage services that are provided along the Newfoundland east coast, in the Lower St. Lawrence ports, and in the Strait of Canso have not been organized into Pilotage Districts as requested by pilots, because the shipping interests have not asked for such a system and also because pilotage needs are adequately met by the existing private organizations.

Whenever any of these three prerequisites ceases to exist, Part VI can no longer apply and the Districts concerned ought to be abolished. This was done, for instance, when ships increased in size to such an extent that some New Brunswick and Nova Scotia ports became inaccessible except to very small vessels. On February 25, 1960, fifteen small Districts of this kind were rescinded by P.C. 1960-235 (Ex. 1144). Most of them had been in existence for more than 60 years.

Merger of Districts for Administrative Purposes

Along the coasts of Canada there are many small harbours to which the three criteria for the establishment of a Pilotage District apply, that is, there is a genuine need for a competent pilotage service, but the number of vessels involved generally does not justify licensing more than one or two pilots. It is illogical to develop for each of these small ports the involved organization of creating and operating a Pilotage District. This is the situation in most of the small commission Districts on the New Brunswick and Nova Scotia coasts. The reason why they were organized in Districts is that at the time there was a thriving trade which has since dwindled for various reasons, but mainly because the port's facilities are now too small for most vessels. As indicated above, 15 of these small Districts were rescinded in 1960 and most of the others are kept in existence merely because the local organizations are in being but, no doubt, they would not be created if the question was being considered in today's context. In some places, the fact that there is a Pilotage District creates a very awkward situation. This was also the problem that faced the small Districts which served the main harbours in Prince Edward Island. An artificial solution was found by merging them into one large District, comprising all the coastal waters of Prince Edward Island, under one single Authority but, in fact, pilotage exists in only a few ports. Licences are issued, not on a District basis but on a harbour basis. This *sui generis* situation, which was not foreseen in the scheme of organization provided in the Act, consists of the merger into one District of a number of former port type Pilotage Districts which are still independent and distinct from one another and whose pilotage services are not in any way integrated or inter-connected. From its description, the Prince Edward Island District would appear to be a coastal District but, in fact, it is not; since pilotage exists only in its ports there is no need for coastal pilotage. This was a reasonable approach and it works very well but the inadequacy of the legislation becomes apparent when the possibility of applying the compulsory payment system is considered. In order to enforce the payment of dues, it would be necessary to revert to the old system of a number of small, independent Districts because, otherwise, it would mean providing pilotage service throughout the waters of the whole District, i.e., coastal pilotage which is not needed.

However, it is believed that the merger type of organization should be resorted to in the small Districts of the New Brunswick and Nova Scotia coasts and a single Authority thus created should be responsible for licensing the pilots in any ports in the area whose importance does not warrant a Pilotage District. Such a move would protect both the licensed pilots and the

shipping interests. The various provisions of the Act should be modified to become consistent with an organization of this type which answers to a definite need.

B. PILOTAGE DISTRICT, A DEFINED AND LOCALIZED AREA

The pilot Part VI deals with is a qualified mariner who is expert in navigation within given confined waters and hires out his services as such to vessels.

The purpose of pilotage legislation is to select from persons who offer or intend to offer their services as pilots those who are qualified mariners and, above all, are expert both in the knowledge of the peculiarities, hazards and conditions affecting safe navigation in the area, and in the art of navigating in its waters.

Since the prime aim of this legislation is to provide (where the need for it exists) a selection process, it is adequately met by relying on a local board, the duties of which are: first, to make regulations defining the type of training and the standard of qualifications needed by pilots for the area over which their jurisdiction extends (subsec. 329(a)); second, to issue licences, limited as to territory, to those who meet the required standards (subsec. 329(d)). Local conditions, by definition, vary from one place to another and that is why a pilot is deemed to cease to be a licensed pilot once he is outside the limits of the District for which his expert knowledge and skill have been appraised (subsec. 333(3)).

For the same reason, a Pilotage Authority is powerless beyond the limits of its District. By-laws, because they are framed to meet the peculiarities and needs of one locality, can not extend over a territory for which they are not intended and its tariff cannot cover services rendered outside the district limits. It is only by general provisions contained in the Act itself that situations outside Pilotage Districts can be dealt with, such as was done for the indemnity that may be claimed by a pilot when through unavoidable circumstances he is carried beyond the limits of his District (sec. 359). Only Parliament has the power to create offences that licensed pilots might commit outside the limits of their District (sec. 368).

The district limit is a real boundary, a geographic line which designates the territory over which the jurisdiction of a Pilotage Authority extends. Inside this line ships requiring pilotage are obliged to employ licensed pilots and, if the payment of dues is compulsory, non-exempt vessels must pay the prescribed dues although they dispense with pilots. Provided this imaginary line does not mark the boundary of a contiguous District, pilots may go beyond it freely to disembark after completing pilotage assignments in their District or to embark to undertake inward assignments.

A district limit should not be confused with a boarding station, which is situated to seaward within a Pilotage District near the district limit. In compulsory payment Districts, ships which require pilotage must display the signal for a pilot in the area defined by the Pilotage Authority in its By-law (C.S.A. subsecs. 348(a) and (b); 349(b)). At present only the British Columbia District defines "boarding station" (B.C. District By-law, sec. 14) but most By-laws contain a "Notice of Requirement of Pilot(s)" which provides that the Master or agent of a vessel requiring a pilot shall notify the Pilotage Authority in sufficient time to enable the pilot to meet the vessel and shall state when and where the pilot is to board and the duty he is to perform (e.g. Quebec District By-law, sec. 10).

Part VI was designed to meet the requirements of a Pilotage District which consisted of a single port approached by a narrow entrance from the sea and serving as the terminus of an inward voyage. Since Part VI legislates for pilotage in single ports only, it is inadequate for other types of pilotage, i.e., the common problems of contiguous Districts including the necessity for uninterrupted service for vessels in transit, and the problems peculiar to coastal Districts. This inadequacy raises many legal questions for which there can be no real solution because appropriate legislation does not exist.

Contiguous Districts

The situation in contiguous Districts differs, *inter alia*, first, because there is more than one access to the District, so that the term "inward voyage" loses the precise meaning it has in the Act and second, because there is at least one common limit with another District.

Subsec. 345(a) provides that in a District where the payment of dues is compulsory, vessels are exempt, if on the inward voyage no licensed pilot offers his services. The meaning of "inward voyage" in Part VI is from sea to harbour and foresees pilots cruising through the boarding area situated at the harbour entrance, i.e., the seaward limit of the District, to offer their services to incoming vessels. The application of such a rule would create a chaotic situation if applied to vessels crossing over the common boundary of contiguous Districts. Sec. 345, which requires vessels to give a reasonable E.T.A. on inward voyages, pre-supposes port pilotage, because a transit voyage is neither inward nor outward. One problem, common to the Authorities of both Districts, is to assure the continuity of pilotage service with the least disruption possible but they are both powerless in this regard.

In 1873, when the first federal pilotage legislation was drafted, this problem existed only between the Districts of Quebec and Montreal, because all other Districts were composed of separate harbours. An adequate solution for that period was found by incorporating in the Act, through provisions of exception, the system that prevailed under pre-Confederation legislation:

Quebec Harbour was made the joint territory of both Districts but only to enable the Montreal pilots to disembark from a downbound trip or to embark for an upbound trip, pilotage within the harbour being a monopoly of the Quebec pilots (sec. 49, 1873 Pilotage Act). Although the feature of Quebec Harbour as joint territory was retained (secs. 322 and 323 C.S.A.), the section dealing with the respective rights of each group of pilots was completely deleted by two amendments passed in 1934 and 1950. The corresponding section in the present legislation (sec. 357) bears no resemblance to the original provision. This creates, *inter alia*, the problem whether the Montreal pilots are now entitled to claim some movages in the harbour of Quebec, and also the legal problem as to which Pilotage Authority has the right to collect as a debt owing to it pursuant to sec. 343 the dues collected from non-exempt ships which are moved in the harbour of Quebec without the assistance of a licensed pilot. Since it is impossible for either one to establish an exclusive right, the right to claim might be denied.

The absence of statutory provisions to deal with the problems of continuity of service between contiguous Districts creates other serious legal problems for the pilots and the Pilotage Authorities. A licensed pilot "who acts beyond the limits for which he is qualified" is considered an unlicensed pilot (subsec. 333(3)). Therefore, if he crosses over into an adjacent District he is performing pilotage illegally and rendering himself and the Master of the ship subject to prosecution under secs. 354 and 356. On the other hand, the various regulations passed by his Pilotage Authority as to his "government and conduct" no longer apply and there is no competent Pilotage Authority to deal with what he may have done while in the other District. Two examples of illegal pilotage are the British Columbia pilot who boards a vessel in the United States, proceeds through the Gulf of Georgia and traverses the New Westminster pilotage waters that extend to the middle of the Gulf, and the Montreal pilot who proceeds into St. Lambert Lock.

Another problem concerning the continuity of pilotage service is approving and licensing pilot vessels. Under the present regulations, there is no objection if the pilot vessels are approved and licensed by both authorities concerned but, since the authorities are independent and autonomous, there is no superior authority to decide between them in case they disagree. The problem, therefore, is not adequately dealt with in the Act. The Pilotage Authorities concerned cannot be forced to pass similar and compatible sets of regulations covering the prerequisites for licensing pilot vessels. Establishing the charge to be levied for the use of pilot vessels may also prove an insoluble problem.

Sec. 357 is not clear in Districts that consist of more than one harbour because it covers the payment of dues for ships "removed from one place to another within any pilotage district." In a District composed of only one harbour this section is straight-forward since it covers movages, which

mariners define as the movement of ships in a harbour, as opposed to navigation, which they consider to mean trips between harbours. Sec. 345 covers the payment of dues by ships who navigate within a Pilotage District. In Districts that cover more than one isolated harbour, e.g. coastal or river Districts, sec. 357 must serve a dual purpose with sec. 345, unless it was intended to use the verb "remove" in the sense of movement not only from place to place inside a harbour but also from harbour to harbour. This would pose the question whether a trip from Vancouver to Prince Rupert or from Quebec to Chicoutimi could be called a movage. It is noted that neither "move", "movage", "navigation" nor "remove" is defined in the Canada Shipping Act with a resultant loss of clarity in some of its sections.

Under the present legislation the Governor in Council has no power to create a joint territory at the common border of two contiguous Districts, because he can not place two Pilotage Authorities in charge of the same territory and there is nothing in the Act to empower him to vary and limit the statutory powers that Pilotage Authorities enjoy in the Act. Furthermore, Pilotage Authorities are powerless to make an agreement between themselves about the extension of the authority of one into the territory of the other.

The 1854 Merchant Shipping Act of the United Kingdom provided a solution; the fact that it was not adopted is a further indication that the organization defined in the 1873 Act was aimed at port pilotage only. The U.K. Act (subsec. 336(6)) authorized Pilotage Authorities to make by-laws covering the necessary arrangements. It reads as follows:

"336(6) To make such Arrangements with any other Pilotage Authority for altering the Limits of their respective Districts, and for extending the Powers of such other Authority or the Privileges of the Pilots licensed by such other Authority or any of them to all or any Part of its own District, or for limiting its own Powers or the Privileges of its own Pilots or any of them, or for sharing the said last-mentioned Powers and Privileges with the said other Authority and the Pilots licensed by it, or for delegating or surrendering such Powers and Privileges or any of them to any other Pilotage Authority either already constituted or to be constituted by Agreement between such Authorities, and to the Pilots licensed by it, as may appear to such Pilotage Authorities to be desirable for the Purpose of facilitating Navigation or of reducing Charges on Shipping".

Coastal Pilotage

Coastal pilotage involved other problems, *inter alia*, frequently crossing beyond the seaward district limit during the course of a pilotage assignment such as occurs on a trip from Cape Beale to Kitimat or from Vancouver to a northern destination by the seaward route. Sec. 361 is meaningless when it

states that the service for which the pilot has been hired is to be held to be performed as soon as the ship passes out of the Pilotage District, at which time the pilot may quit the ship. The type of pilotage foreseen here is obviously port pilotage.

COMMENTS

It is considered that the present legislation is inadequate, in that the problems of contiguous Districts, river Districts and coastal Districts are not covered, although most pilotage in Canada (excluding the Great Lakes Basin for which there is special legislation, Part VIA) is performed in Districts where these problems arise: Quebec, Montreal, Cornwall, New Westminster and B.C. Districts, and even the Halifax District, which is a coastal District although it is treated as a one harbour District.

If in future legislation the District type of organization is to be retained, a realistic view of Canadian problems should be taken by providing rules applicable to all cases and, when necessary, making specific provisions applicable to each specific situation rather than basing the legislation on one type of District only, as is done in Part VI.

C. PILOTAGE DISTRICT, AN INDEPENDENT AND AUTONOMOUS ORGANIZATIONAL UNIT

The Pilotage District is organized as an autonomous and independent unit. Once the District is established only its Pilotage Authority can take the necessary decisions to make it function: *inter alia*, determining the nature and extent of the qualifications to be required of candidates for a pilot's licence, how many pilots ought to be licensed, the method and amount of their remuneration, whether a given candidate meets the prescribed standards and should he be issued a licence. It is true that many of these powers can not be exercised without the authorization of the Governor in Council but the responsibility and the initiative for decisions rest with the Pilotage Authority. The Governor in Council's only power is either to approve or disapprove whatever is requested but he can never impose any decision or by-law, give directives or dictate policy. Provided that the Pilotage Authority is acting within the limits of its powers no one can interfere with, or revise, its decisions and there is no possible appeal to any higher authority. It is the sole and absolute master both as to policy and administration within the limits of its District.

Four different authorities have a part to play in the organization plan of Part VI: Parliament, the Government, the Minister of Transport and the various Pilotage Authorities. To complete the list: (a) the Minister of Finance has one secondary function, i.e., co-administrator with the Minister of Transport of the various Pilot Funds of the Districts where the Minister of Transport is the Pilotage Authority and of the commission Districts with the

Governor in Council's permission (sec. 373); (b) the Treasury Board functions if the Financial Administration Act applies to Pilotage Authorities. (This question is studied later in C. 5, p. 97 and C. 8, p. 319.

In the preamble to this study the functions and responsibilities of each of these authorities were set out briefly. They are studied in detail hereunder.

Powers of Parliament

Parliament is the supreme authority but it acts only through legislation. In pilotage matters, it draws its jurisdiction from the British North America Act (vide *The Contract of Pilotage*).

In the organizational scheme of Part VI as it now stands Parliament has generally confined its role to establishing a framework and enacting provisions of general application. It has delegated to the licensing authorities the responsibility and the power to complete the legislative provisions required to meet the local and particular needs of each District. These delegated powers are defined in specific provisions of the Act which will be studied later (C. 8, p. 241 and ff.) Any by-law or regulation that does not come within the ambit of one of these statutory provisions is null and void as being *ultra vires*. No one can legislate in lieu of Parliament except with the leave of Parliament given in the specific provisions of an Act. A delegation of powers is to be interpreted restrictively.

In pre-Confederation days, general schemes of organization existed in the laws of the Maritime Provinces and of British Columbia on account of the numerous coastal ports which had their own independent pilotage organizations. In Lower Canada, *ad hoc* legislation was indicated to cope with the unique case of pilotage on a river 400 miles long with two major harbours and several small ports en route. No general legislation was indicated and the matter was dealt with by specific legislation providing for an organizational structure suited to the two sectors of the river and containing provisions dealing, *inter alia*, with the continuity of the service from one sector to the other. The legislation that was passed was the Quebec Trinity House Act governing the specific scheme of organization applicable to the Port of Quebec, i.e., to what is now known as the Pilotage District of Quebec, and the Montreal Trinity House Act applicable to the Port of Montreal, i.e., the District of Montreal.

The first Federal Act had to provide for a system which would meet general needs throughout the new Confederation, in various ports of the Maritime Provinces, in British Columbia and in other areas, without having to apply to Parliament each time. Furthermore, since the administrative problems connected with pilotage service in small coastal ports could in no way be compared to the complexity and importance of the pilotage organization on the River St. Lawrence, a simpler and more expeditious system had to be arranged. The 1873 Act adopted as the basis of legislation the system

of local commissions that had been in use in British Columbia and in Maritime ports. Parliament also delegated to the Governor in Council authority to form these commissions.

There is nothing, however, to prevent Parliament from covering in its legislation the specific needs of a given region or even from dealing with a specific and essentially local problem. This becomes a necessity when, on account of special circumstances or peculiarities, the basic scheme and the general provisions of the legislation in force can not be applied. Legislation of exception is then adopted, e.g. Part VIA for the Great Lakes Basin. In the 1873 Act, special provisions were enacted to retain the scheme of organization that existed in Lower Canada thereby resolving the problems of contiguous Districts and of river pilotage.

However, most of these 1873 provisions of exception have since been deleted by subsequent amendments, thus making the legal scheme of organization in these Districts conform to the general rule. Unfortunately, some necessary provisions were abrogated without being replaced by general provisions to cover local problems, while others that could have been dispensed with were retained. These will be discussed later.

The very fact that a provision is passed by Parliament, i.e., is incorporated into an Act, gives in practice a certain character of permanency. This procedure should be followed for basic provisions and those of general application but it should not be followed lightly for enactments of a local character because it may prove to be more of a burden than an advantage. The real obstacle is the obligation to resort to the procedure of having legislation passed each time a change is desired. Experience has proved that it is a very involved process whose consequences are frequently uncertain, e.g. it took 29 years to have the eastern district limit of Quebec amended in the Act to make it conform with the real limit which had been moved from Bic to Father Point in 1905, and the next move from Father Point to Les Escoumains, which occurred in 1960, has not yet been reflected in sec. 322. Another example: the Seaway has been open since 1959 and the western limit of the District of Montreal has not, as yet, been modified to define which part of the entrance to the Seaway is part of the District. Again, in view of the exception contained in sec. 328, the Quebec Pilotage Authority is powerless to have the District expenses charged to the Pilotage Authority's expense fund.

Powers of the Government

The main rôle of the Government is to decide when and where a licensing body should be established and to establish it. Its secondary rôle is indirect control over local legislation and expenditures by Pilotage Authorities. These will be studied later in C. 8, p. 244 and C. 5, p. 98 and ff.

The powers of the Governor in Council pursuant to Part VI are the following:

- (a) *To create Pilotage Districts, fix their limits and rescind them* (sec. 324). The Act provides two exceptions to this rule, i.e., the Districts of Quebec and Montreal, the existence of which is recognized and guaranteed by the Act itself (secs. 322 and 323). As will be seen later, there is no practical reason for retaining this status of exception which has been, and remains, a source of administrative difficulty.

The Act does not indicate the criteria on which the Government's decision to create a District should be based, but, as already discussed (vide pp. 45-46), these are apparent from the legislation taken as a whole. The list of Pilotage Districts established since 1873 (abrogated or operative) appears in Appendix II.

Since the limits of a District denote the extent of the territorial jurisdiction of the Pilotage Authority and the validity of the pilots' licences, it is of prime importance to describe them simply and completely and to use as reference points geographical features that can be identified easily. Instances have been found of limits being described by reference to a description contained in some other statute. This uninformative practice makes it necessary to consult other legislation and, in addition, creates a number of problems, *inter alia*, whether the district limits are altered if the description in the quoted statute is modified for reasons unconnected with pilotage. Two examples of the difficulties and uncertainties thus created are the limits of the Halifax District and the northern limit of the New Westminster District which are defined by reference to electoral district boundaries.

- (b) *To alter the boundaries of any Pilotage District*, (sec. 324). This is a new power which was granted when the 1934 Act was approved. Because of the intended generality of its terms it applies to all Districts including Quebec and Montreal (vide Quebec District, *Legislation*). However, the Government refrained from using this power when it became necessary to alter the limits of these two Districts, and tried instead (without success to date) to have the Act amended. Included in the problems that remain unsettled are the eastern limit of the Quebec District, the western limit of the Montreal District and the *de facto* division of the Montreal District at Three Rivers.

The need arose to modify the eastern limit of the District of Quebec when the eastern station was moved from Father Point to Les Escoumains but it was considered that sec. 324 did not give

sufficient authority for the Governor in Council to take action tantamount to amending sec. 322 (vide Quebec District, *Legislation*). Therefore, since 1960 the District has been operated as if the eastern limit was at Les Escoumains, no pilotage is performed by the licensed pilots east of Les Escoumains and at Rimouski and Forestville pilotage is performed by unlicensed pilots despite the fact that those ports are still within the legal boundaries of the District. This is obviously an abnormal situation.

In the Montreal District, the existing definition of the western limit as the eastern entrance to the Lachine Canal has been totally inadequate since 1959 when the Seaway opened. The Pilotage Authority has tried to settle the matter by amending the District By-law but this action is ultra vires because it emanates from the Pilotage Authority instead of the Governor in Council. When the pilots requested a division of the District at Three Rivers more than a simple modification of limits was involved and a general amendment to the Canada Shipping Act was sought in 1959 by Bill S-3, which would have given the Governor in Council the same power to alter the limits of the Quebec and Montreal Districts as he possesses over the other Districts in Canada. However, the Bill was dropped because it contained a number of contentious provisions.

- (c) *To appoint Pilotage Authorities in all Districts.* These appointments are during pleasure in view of the absence of provisions dealing with the question of their removal (subsec. 31(k) Interpretation Act 1952 R.S.C. 158).

The Act contains neither criteria for appointing Pilotage Authorities nor grounds for removing them. The evidence received is to the effect that in the small, commission Districts political considerations are recognized and the appointment of a new board is expected whenever there is a change of Government in Ottawa. It was explained that the Government is guided on the matter by the desire of the local population as expressed by the recommendation of their Member of Parliament. No consideration is given to the qualifications of the members of the Pilotage Authority who are being dismissed, nor to the adequacy of their administration, nor whether the pilotage service might suffer. The change in the Pilotage Authority is sometimes followed by the dismissal of the pilots who were licensed by the previous administration and the appointment of other pilots.

This practice is not new, as is shown by the 1915 Supreme Court of Canada judgment in the case of *McGillivray v F. C. Kimber et al* (52 S.C.R. 146). On June 13, 1912, Pilot McGill-

livray, who had been a licensed pilot for 25 years, was dismissed, prior to the expiration of his licence, at the first meeting of the newly appointed board of the Pilotage Authority for the Sydney District without being charged or given the opportunity to defend himself. The Pilotage Authority acted in an arbitrary manner. At the trial, one of the members of the Pilotage Authority admitted that one reason for the dismissal was political.

The Commission can not but condemn the practice of appointing Pilotage Authorities in this manner. It makes a farce of the pilotage organization and at the same time seriously endangers the safety of those ships which the Government entrusts to pilots whose qualifications and skill are judged by Pilotage Authorities with doubtful standards.

If the interests of navigation are so utterly disregarded in these Districts, it can only mean that there is no need for a pilotage organization and these Districts should be abolished.

The Pilotage Authority of a District can be of two types, a board of three to five members, or a one-man Pilotage Authority in the person of the Minister of Transport. As stated in sec. 325 C.S.A. the rule is that the Pilotage Authority should take the form of a local board or commission, but in practice this has become the exception.

Formerly, a board composed of local people was the only possible form of Pilotage Authority. The 1873 Pilotage Act created exceptions for the four Districts of Halifax, Saint John, N.B., Quebec and Montreal but only in the number of commissioners, their method of appointment or election and their status as a corporate body. These Authorities remained local boards.

In the present legislation there are two exceptions. The first concerns the Districts of Quebec and Montreal where the Governor in Council is prohibited from appointing such a board as Pilotage Authority. This prohibition is a carryover from the former legislation. Because the Trinity House Acts set out the procedure for appointing and electing the commission members, a limitation on the general powers of the Governor in Council had to be incorporated in the 1873 Act in order to avoid conflicting legislation (sec. 17). Since this special legislation was abolished many years ago there is now no reason for retaining the prohibition. The question of the special status given to Quebec and Montreal in secs. 324, 325 and 326 C.S.A. is studied at length under Legislation in the report on these Districts. It suffices here to say that the Commission has discovered no argument in favour of keeping what still remains of these special provisions. Apparently they are still in the statute partly for historical reasons and partly on

account of the unjustified fear of the pilots that they might lose some vague and undefined acquired rights. No serious representations on the subject were made to the Commission, not even by the pilots. It is believed that these special provisions, which served a useful purpose in the past, are no longer warranted and that, moreover, they make the pilotage service in these Districts more difficult to administer.

The second exception is contained in sec. 327 which provides that the Governor in Council may appoint the Minister as Pilotage Authority for any District or part thereof. Subsec. 2(69) states that the Minister as Pilotage Authority means the Minister of Transport and includes his Deputy Minister.

The first appointment of this nature was in 1903 when the Minister of Marine and Fisheries was appointed, by special legislation, Pilotage Authority for the District of Montreal. In 1904 the principle was extended to all Districts (vide *History of Legislation*). Eventually the exception became the rule and the Minister (Minister of Transport) became the Pilotage Authority in all the large Pilotage Districts, except New Westminster.

The practical effect of this change was that the basic principle of organization provided in the Canada Shipping Act was materially changed. At present, the *de facto* situation is that most pilotage administration is no longer decentralized; all important Pilotage Districts are administered from Ottawa by officers of the Department of Transport, i.e., by a department of government, instead of by independent, local agents. The Pilotage Authority is no longer a group of persons always available at local level and with complete up-to-date knowledge of the situation in one given District but is one person in Ottawa, the Minister, acting as common Pilotage Authority. He is remote from local realities, and, because of his other pressing responsibilities, he is unable to deal personally with questions of local policy, and is forced to have his pilotage responsibilities performed in his name by a large number of departmental advisers in Ottawa.

The one condition imposed by subsec. 327(1) on the selection of the Minister as Pilotage Authority is that it must appear to the Governor in Council that the appointment is "in the interest of navigation". However, none of the Orders in Council appointing the Minister as Pilotage Authority now in force make any mention of this requirement, nor is this vague expression defined anywhere. If interpreted in relation to the context, it can only mean that the action is taken in the interest of shipping for the convenience of which the licensing organization is established.

When this one-man Pilotage Authority system was made part of the Pilotage Act in 1904, there was an additional condition, i.e. that the appointment was required by local interests. It was deleted by a 1919 amendment, no doubt to regularize the appointment of the Minister as Pilotage Authority in the Halifax District which had been made the previous year under the War Measures Act on the recommendation of the Robb Royal Commission (vide *History of Legislation*).

It is permissible for the Minister to be appointed Pilotage Authority for part of a District only. This would create the awkward situation of having two Pilotage Authorities over one group of pilots. This provision, which has been in the Act since 1904, has never been used. The advantages of such a provision are difficult to visualize but the disadvantages and problems it might occasion are obvious. It is considered that this power should be deleted so that there could never be more than one Authority in any given District.

- (d) *To determine whether the payment of pilotage dues is to be made compulsory in the Districts created by him (sec. 326).* Here again the exception is a surviving remnant of former legislation now repealed. There are only two Districts that have not been, and can not be, created by the Governor in Council, i.e. Quebec and Montreal. Prior to 1934 it was specifically provided in the section corresponding to the present sec. 345 that the payment of dues was to be compulsory in the four Districts of Quebec, Montreal, Halifax and Saint John, N.B. and also in those other Districts where it had been so enacted by the Governor in Council who had created them. In 1934, mention of the four Districts was deleted but the rest was left unchanged with the result that the payment of dues in the Quebec and Montreal Districts ceased to be made compulsory by statutory provision and power to do so in these two Districts (which the Governor in Council had not the power to create) was not delegated.

According to the rules of interpretation, this can not be taken otherwise than to mean that Parliament intended at that time to amend the previous legislation and to provide that the payment of dues could not be made compulsory in these two Districts except by decision of Parliament. (for further comments on the matter, vide Quebec District, *Legislation*).

Here again the law is silent on the subject of criteria for the adoption of the compulsory payment system, but they can be deduced from the context. (This will be studied later in C. 7, pp. 211 and ff). Suffice to say that the aim is not to provide additional

revenue to finance the operation of the service but to urge Masters to employ pilots in order to give the pilots more practice and, indirectly, more revenue.

From the wording of sec. 326, it appears that for the purpose of deciding whether to adopt the compulsory payment system, the District must be treated as a whole and that compulsory payment can not be made applicable in part of a District. This is confirmed by the generality of the terms used in all the sections which deal with the compulsory payment system, such as secs. 345, 348, 349 and 357. Whenever it is intended to make a provision applicable in part of a District only, this distinction is specifically made, e.g., subsec. 327(1). In fact, payment of pilotage dues has never been made compulsory in part of a District only. The only satisfactory explanation for the lack of flexibility is that Part VI was designed for port pilotage. In theory, Part VI could be incompatible with the separate needs of the various localities in river and coastal Districts and, as pointed out earlier, it is not applicable to a federation type District like Prince Edward Island (vide p. 47). In practice, no problems arise because occasional traders take pilots whether payment is compulsory or not.

(e) *To determine in regulations made by himself, which signals Masters should display, when requiring a pilot in Districts where the payment of dues is compulsory (sec. 363).* To date the Governor in Council has never exercised this power with the result (as will be seen later) that many sections of Part VI dealing with the compulsory payment of dues can not be applied. Prior to 1934, the matter was covered in the Act itself, e.g. sec. 466 of the 1927 Canada Shipping Act stated the signals were:

- (i) "In daytime, the Jack or other national colour usually worn by merchant ships, having around it a white border one-fifth of the breadth of the flag, hoisted at the fore".
- (ii) "At night, a blue light every fifteen minutes; or a bright white light, flashed or shown at short or frequent intervals, just above the bulwarks, for about a minute at a time".

When the Act was revised in 1934, these particulars were deleted and the responsibility for legislation on this point was delegated to the Governor in Council. At that time an international agreement was reached on the signals to be displayed by ships throughout the world. In reply to a query from the Commission, the Department of Transport stated (Ex. 1480):

"none of these sources (Department's Law Branch, the Department library and the Public Archives) was successful in finding a regulation concerning this subject and, therefore, one must assume that there has

never been such a regulation passed. However, the signals for pilots are contained in the International Code of Signals which was brought into effect by international agreement on January 1, 1934. According to our files in 1934 the Department at that time considered no other action was necessary”.

In Appendix B of the International Code of Signals, Vol. 1, signals for pilots are dealt with as follows (Ex. 1480):

“The following signals, when used or displayed together or separately, shall be deemed to be signals for a pilot:

In daytime:

- 1 . The International Code Signal G signifying “I require a pilot”.
- 2 . The International Code Signal PT signifying “I require a pilot”.
- 3 . The Pilot Jack hoisted at the fore.

At night:

- 1 . The pyrotechnic light, commonly known as the blue light, every 15 minutes.
- 2 . A bright white light, flashed or shown at short or frequent intervals just above the bulwark for about a minute at a time.
- 3 . The International Code Signal PT by flashing.”

However, this international agreement was never made part of Canadian legislation, even by Order in Council, and the only official action took the form of Notices to Mariners stating that the new code had come into effect on January 1, 1934, e.g. Notice to Mariners No. 64 of 1938. Since a Notice to Mariners can not have any binding effect and does not meet the requirement of sec. 363, at present, a “signal for pilots” has not yet been legally approved.

Because the five powers studied above are delegated powers, they can not be exercised by anyone except the Governor in Council to whom they were specifically delegated by Parliament. Furthermore, in the absence of a specific provision (none is contained in the Act), according to the legal axiom “*Delegatus non potest delegare*” these delegated powers can not be further delegated. Therefore, all By-laws passed by Pilotage Authorities infringing on any of these powers are illegal, as ultra vires. The fact that the By-laws received the sanctions of the Governor in Council does not cover the nullity because the By-laws remain enactments of the Pilotage Authority. For instance, the following are null and void:

- (a) Subsec. 6(1) of the British Columbia District General By-law (P.C. 1965-1084).

- (b) Subsec. 6(1) of the New Westminster District General By-law (P.C. 1961-1740).
- (c) Subsecs. 6(1) of the Quebec District General By-law (P.C. 1957-191) and 4(1) of the Montreal District General By-law (P.C. 1961-1475) making the payment of dues compulsory in these two Districts. As seen above, even the Governor in Council could not make such an enactment.
- (d) The definition of the Harbour of Montreal contained in the Montreal District General By-law subsec. 2(h) is illegal inasmuch as it extends the jurisdiction of the Pilotage Authority beyond the District limits as defined in sec. 323, which do not include the entrance to the Seaway.

These illegal provisions in the By-laws purport to remedy deficiencies in the legislation but the only correct way to amend legislation is by amendment to the Act itself. The examples above do not fall within the regulation-making powers of the Pilotage Authority.

Powers of the Minister of Transport

The Minister, as head of the Department of Transport, has a minor role in the scheme under Part VI. He has absolutely no authority to intervene in the administration of any District or to dictate any policy or course of action to the Pilotage Authority. This is consistent with the philosophy of the basic organization of Part VI that Pilotage Districts draw their authority directly from Parliament and should be totally independent of one another and of any department of Government. Apart from sec. 327, where his possible appointment as Pilotage Authority is mentioned, the name of the Minister occurs only twice in Part VI:

- (a) To play the role of arbitrator to establish the pilots' contribution to the pilot fund, if the pilots and the Pilotage Authority concerned fail to agree (subsec. 319(m) 1934 C.S.A.).
- (b) To exercise surveillance over the activities of the Pilotage Authorities (sec. 332).

When the Act was revised in 1934, the Pilotage Authority was deprived of discretionary power to fix the compulsory contribution of the pilots to the District pilot fund and the above procedure was introduced. It is to be noted that the aim of the legislation is defeated wherever the Minister is also the Pilotage Authority. It is inconsistent that one of the parties to a dispute can also act as arbitrator. If the intention of the legislation is to obtain an independent decision, in this event provision should be made for an independent arbiter. Furthermore, because in the 1934 amendment Parliament has covered the subject completely and because no power was given any

Pilotage Authority to vary the contribution by regulation, all the By-law provisions that deal with it are *ultra vires*. Illegal provisions of this nature are contained in the By-law of every Pilotage District where a pilot fund was created by the Pilotage Authority.

Sec. 332 C.S.A. states that the Minister in his surveillance rôle shall require from each Pilotage Authority yearly within fifteen days after the end of the fiscal year whatever pilotage returns or reports he may deem necessary. This section was given its present form in 1934. In former legislation (*vide* sec. 422, 1927 C.S.A.) the report was to cover the calendar year and all the particulars it was to contain were listed. The amendment was probably made to avoid having to amend the law each time it was deemed advisable to modify the list in order to meet changing conditions.

The Minister has not issued a set of instructions or regulations on the matter but has merely prepared a printed, blank return form which lists the subjects on which information is required. The form applies only to Districts where the Minister is not the Pilotage Authority; it is felt at department level:

“that when the Minister is the Pilotage Authority for a district, sec. 332 does not apply, since he would be making a report to himself”.

However, in these Districts the local Supervisors always make a full report. The return form was last modified in 1962, and, apparently through an oversight, was made to cover the calendar year (Ex. 1485).

Aside from receiving the reports, it is obvious that very little else is done to discharge this surveillance duty. Analysis of these reports by the Commission has revealed a number of flagrant irregularities and contraventions of the provisions of the Canada Shipping Act, repeated year after year, for instance, local Commissioners illegally remunerating themselves out of pilotage revenue as was done for many years at New Westminster; the appointment of a Secretary-Treasurer and the payment of his remuneration out of pilotage moneys without the appointment or the remuneration being sanctioned by the Governor in Council as specifically required by sec. 328; temporary licences being issued when not provided for in the By-law; dues collected from non-exempt vessels which dispensed with pilots being credited to the pool of pilots' earnings rather than to the pilot fund or to the expense fund as required by the Act, etc.

On the other hand, the pilotage staff of the Department has been busy, as noted earlier, actually administering the Districts where the Minister is the Pilotage Authority. Here again, the Minister is charged with an incompatible responsibility, i.e., the obligation to exercise surveillance over himself in that this duty is performed by the same staff that administers the Districts of which he is the Pilotage Authority. Under these circumstances the reports referred to in sec. 332 can scarcely fulfil their intended purpose—a situation which leaves much to be desired.

The Department of Transport advises the various Pilotage Authorities on pilotage matters, especially the drafting of by-laws and also serves as liaison between them and the Governor in Council when their By-laws and other proposals are presented for the Governor in Council's approval. Here again, this procedure is generally unsatisfactory as is shown by the number of ultra vires provisions that appear in every By-law.

The Minister of Transport, as such, has other powers which indirectly affect pilots and pilotage. They are derived from the provisions of Part VIII of the Act under which he may order a preliminary inquiry into a shipping casualty, or convene a court of formal investigation in respect to shipping casualties or to the fitness, competence and reliability of persons including pilots, having charge of vessels (unless he orders an inquiry under section 579). Parliament has made the Minister of Transport responsible for the safety of navigation in Canadian waters and Part VIII defines some of the ways this responsibility is to be discharged. Part VIII is of general application, and it may affect a pilot if he becomes a safety risk or is involved in a shipping casualty. (This situation is studied later in C. 9, p. 357 and ff.)

Powers of the Pilotage Authority

The powers of the Pilotage Authority will be dealt with later in C. 8. Other aspects of this study are given precedence to ensure fuller understanding and to avoid repetition as much as possible.

Chapter 4

THE CONTRACT OF PILOTAGE AND THE STATUS OF THE LICENSED PILOT

PILOT, A PUBLIC OFFICER

Intervention by the Crown as provided in Part VI, C.S.A. is based on the individual, civil, pilotage contract made between a vessel and a licensed pilot when he exercises his profession as a self-employed, independent contractor.

“Licensed pilot” is defined in the Interpretation Section (subsec. 2(44)) to mean “a person who holds a valid licence as pilot issued by a Pilotage Authority”. In other words, he is a person who is duly authorized to act as pilot, i.e. to enter into pilotage contracts with vessels in a given Pilotage District. However, the licensed pilot is a pilot only when he meets the two requirements of the statutory definition of subsec. 2(64), i.e., “has the conduct” of a ship and is not a member of the crew.

Because of the licence he holds from the Crown the pilot was declared a public officer in a judgment rendered October 17, 1899, by the Supreme Court of New Brunswick, in Equity¹, which held that:

“the office (of licensed pilot) is public and independently substantive” because
“... The source of the office is clearly mediately or immediately from the Crown; its tenure is not during pleasure and its duty is certainly of public and independent character ...”

¹The Attorney-General of New Brunswick v Miller *et al* (2 N.B. Equity Reports, p. 28). The facts of the case, as related in the judgment, are briefly: On April 7, 1899, the Miramichi Pilotage Authority, without consulting the pilots, passed a by-law whose general effect was to reduce pilotage dues. When the pilots' request for repeal of the by-law was refused, all 20 District pilots went on strike May 23 by resigning their licences. Three or four large steamers and two sailing vessels which were loaded and ready for sea had to sail that day or wait ten or twelve days for the next spring-tide. In anticipation of the pilots' action, the Pilotage Authority had previously amended the District By-law without consulting them to enable the Authority to issue a licence to any person it found competent. The amendment was approved by the Governor in Council. When the strike occurred four new pilots were licenced and they performed pilotage at Miramichi. The Attorney-General sought an injunction against them claiming that their licences were illegal. The petition was dismissed on the ground that a pilot held a public, substantive, independent office emanating immediately, if not mediately, from the Crown. Since the objections to the validity of the defendants' licences did not claim that they had been licenced unfairly or in bad faith, the remedy, if any, should not be sought by injunction but by information in the form of a *quo warranto*.

Since the philosophy of the legislation is that the pilotage service exists for the convenience of shipping and not on the grounds of safety of navigation or of public necessity, the customary status of the pilot did not have to be modified and, in fact was not changed by Part VI: whether licensed or unlicensed, the pilot is a self-employed professional who hires out his services to navigate vessels. The pilot is hired by the ship, i.e. by her Master, owner, agent or consignee, not as an employee but as a free contractor making his expert services available for a specific assignment under the authority and the responsibility of the Master.

In areas where pilotage is not organized by the Crown, both parties are almost completely free to bargain and the rights, responsibilities and duties of both parties result from the civil agreements that are arrived at through mutual consent. Normally their freedom is restricted only by the general limitations contained in the civil legislation of the province where the contract is made but, since the consideration of the contract is the navigation of a ship, they may also be affected by restrictions contained in federal legislation pursuant to the principle of ancillary powers in constitutional law. The British North America Act gave the Federal Parliament implicit power to legislate in provincial fields of legislation to the extent necessary to prevent the defeat of any scheme of federal legislation dealing with a matter under exclusive federal jurisdiction.

FEDERAL AND PROVINCIAL JURISDICTION

Pursuant to sec. 91, subsec. 10, of the British North America Act, "Navigation and Shipping" fall within the exclusive legislative authority of the Parliament of Canada. Any doubt that pilotage came under this heading was removed by the Privy Council decision rendered in 1920 in *Paquet v Corporation of Pilots of Quebec Harbour* 1920 A.C. 1029 (1920, 54 D.L.R. 323). The pertinent excerpt reads as follows:

"After the quasi-federal distribution of legislative powers which was effected by the B.N.A. Act in 1867, it is clear that the power to pass laws regulating the pilotage system of the harbour was given exclusively to the Dominion Parliament. Navigation and shipping form the tenth class of the subjects enumerated as exclusively belonging to the Dominion in sec. 91 of the Act, and the second class in the section, the regulation of trade and commerce, is concerned with some aspects at least of the same subject. Whether the words trade and commerce, if these alone had been enumerated subjects, would have been sufficient to exclude the Provincial Legislature from dealing with pilotage, it is not necessary to consider, because, in their Lordships' opinion, the introduction into sec. 91 of the words "navigation and shipping" puts the matter beyond question. It is, of course, true that the class of subjects designated as "property and civil rights" in sec. 92 and there given exclusively to the Province would be trenched on if that section were to be interpreted by itself. But the language of sec. 92 has to be read along with that of

sec. 91, and the generality of the wording of sec. 92 has to be interpreted as restricted by the specific language of sec. 91, in accordance with the well established principle that subjects which in one aspect may come under sec. 92 may in another aspect that is made dominant be brought within sec. 91. That this principle applies in the case before their Lordships they entertain no doubt, and it was, therefore, in their opinion, for the Dominion and not for the Provincial Legislature to deal exclusively with the subject of pilotage after Confederation, notwithstanding that the civil rights and the property of the Corporation of Pilots of Quebec Harbour might incidentally, if unavoidably, be seriously affected."

On the other hand, various operational aspects of navigation involve activities that are normally governed by provincial legislation, e.g., sales, hiring of personnel, contracts for services, etc. As stated earlier, the civil legislation of each province applies to all contracts made within its boundaries to the extent that provincial legislation is not superseded by federal legislation. In addition, any pre-Confederation legislation on pilotage that was not repealed, directly or indirectly, after Confederation remains in force. For instance, the Canada Shipping Act does not create any privilege or lien against a ship to guarantee the payment of pilotage dues but, when the hiring contract is made in the Province of Quebec, subsec. 2383(2) of the Civil Code, which predates Confederation, provides such a privilege and a maritime lien against vessels.

As seen earlier, in areas where there is no Pilotage District (except in the Great Lakes Basin) the only federal legislation that appears to affect civil legislation on the contract of hiring as applied to pilots is contained in sec. 359 C.S.A., which fixes the indemnity payable to a pilot who is taken to sea or beyond the limits for which he is licensed, and in subsec. 362(2) C.S.A., which limits the pilots' civil liability for damage or loss occasioned by their neglect or want of skill. Under provincial law the pilots would normally be answerable to the full extent of damages but, by this provision in the Canada Shipping Act, the Federal Parliament has limited their liability to a maximum of \$300.

Where there are Pilotage Districts (and hence licensed pilots) the basic situation remains the same, but there is greater federal intervention into the extent of the freedom of each party to vary the conditions and terms of the contract for services. The vessel and the pilot remain the sole parties to the contract of hiring for pilotage and, as will be shown later, the Pilotage Authority can neither be the employer of its pilots nor be a party to a pilotage contract. When a pilot, whether he holds a licence or not, is performing pilotage he derives rights, duties and responsibilities from the contract for services that was concluded between the ship and himself. Automatically included are all the other provisions of provincial and federal legislation that are applicable in the District concerned.

PILOTAGE CONTRACT THE BASIS OF PILOTAGE LEGISLATION

Part VI of the Act has been drafted to implement the basic principle of a pilotage service furnished by self-employed, independent pilots pursuant to contracts for pilotage which they make with vessels. This is apparent, *inter alia*, from the following sections of Part VI which otherwise would be inconsistent:

- (a) With respect to the status of the pilot aboard a ship, the Act refers to him as having "undertaken to pilot" the ship (subsec. 329(f)(vii), sec. 361).
- (b) The nature of the contract is one of hiring for service between the ship and the pilot; subsec. 329(f)(vii) speaks of the situation when, without the Master's consent, a pilot quits the ship "before the service for which he was hired has been performed."
- (c) Subsec. 335(1) refers to the contract of hiring when it makes it an obligation for the pilot to show his licence and other pertinent documents "whenever so required by the master of any ship or other person by whom he has been employed so to act."
- (d) Pilotage dues are recoverable as "a debt due to the pilot" when they are payable to him (sec. 343).
- (e) The pilot "offers his services as a pilot (subsecs. 345(a), and 348(a)).
- (f) A pilot is deemed to be hired, *inter alia*, when he is taken aboard for the purpose of piloting a ship (sec. 352); when his offer is accepted by the Master (subsec. 348(a)); or when a ship has asked for a pilot by displaying the proper signal and a pilot has accepted to act as pilot (subsec. 348(a), secs. 349, 350 and 351).
- (g) In a Pilotage District "a master of a ship shall not employ as a pilot any person who is not a licensed pilot" (subsec. 354(3)(b)).
- (h) Sec. 361 states that the contract of hiring is terminated when any one of the circumstances described therein is met, "whichever first happens, whereupon the service for which he (the pilot) was hired shall be held to be performed".
- (i) When the pilot provides his own transportation to offer his services, sec. 366 requires that the vessel he uses be identified by the proper signal when he is "in the exercise of his calling".
- (j) It is a statutory offence for a pilot to use false pretenses that might jeopardize the safety of a ship, or to use a pilot's licence to which he is not entitled in order to be employed or to endeavour to be employed as pilot (sec. 371).

- (k) It is a statutory offence for a licensed pilot to demand or receive "in respect of pilotage services" a sum greater than the rate prescribed in the District By-law (sec. 372).

EXTENT OF FEDERAL INTERVENTION

When state control over the exercise of a profession is established in order to verify the qualifications and reliability of its members there will necessarily be some encroachment on their previous freedom to make contracts. If licences are granted, the implication is that those who do not hold licences have no right to practise that profession. On the other hand, retention of a licence is conditional on the fulfilment by its holder of the terms imposed by law and by regulations whose aims are to maintain the standards of quality and efficiency guaranteed by the licence. (Re compatibility of licensing function with other status of pilots vide C. 8, 300 and ff.)

In Part VI C.S.A., Parliament has effected many changes and restrictions and, at the same time, has brought about a certain uniformity across Canada in the method of contracting to perform pilotage services within a Pilotage District. These are:

(a) Contracting on the part of the pilot:

- 1 . Except in a few exceptional circumstances which are expressly defined, only a licensed pilot can be hired to act as pilot (secs. 354 and 355), i.e. he has the legal capacity to enter into a contract for pilotage.
- 2 . A person over 70 years of age can not be granted a licence. If he holds a licence it automatically lapses, thus depriving him of the right to enter into contracts for pilotage (sec. 338).
- 3 . A licence holder automatically forfeits his licence if he "does not act as a pilot for a period of two years" (sec. 336).
- 4 . The prerequisites to become a licence holder, that is, to acquire the right to enter into pilotage contracts, are stated in regulations made by Pilotage Authorities. A licence can be retained only if the holder complies with the terms and conditions imposed by regulations covering his physical fitness, his own "government" and conduct (sec. 329).
- 5 . The licensed pilot has no part in fixing the amount to be paid for his services. This is done by regulations drawn up by the Pilotage Authority (subsec. 329(h)). Not only is it illegal but also it is a statutory offence for a pilot to demand, or even to receive, a greater sum for pilotage services than prescribed by law (sec. 372).

6. The pilot can not refuse to enter into a contract provided he is fit and available and the Pilotage Authority has made a By-law provision to this effect (subsec. 329(f)(v)). Up to 1936, this provision was contained in the Act itself and it was a statutory offence for a pilot to refuse, or to delay, to take charge of a ship displaying the signal for a pilot, or, upon being so required by any of the authorities responsible for the ship (the Master, the owner, the agent or the consignee), or by an officer of the Pilotage Authority, or by any chief officer of Customs (subsec. 530(g) 1927 C.S.A.; subsec. 70(7) 1873 Pilotage Act).
 7. The pilot has no right to negotiate over the nature and duration of the pilotage service he is to perform within the limits of the District for which he is licensed: it is the Master who decides and the pilot who then performs the required pilotage. His refusal, in addition to being a breach of contract, can also become a By-law offence (subsec. 329(f)(vi)). The extent of his undertaking is determined by the Act which stipulates when his contractual obligations are to be deemed to be completed, i.e. when the "ship is finally anchored or safely moored at her intended destination or as near thereto as she is able to get at the time of her arrival or as soon as she passed out of the pilotage district to which his licence extends" (sec. 361). But outside the limits of his District he is considered an unlicensed pilot (subsec. 333(3)) and enjoys all the rights of an unlicensed pilot in those waters (although he may commit a breach of the disciplinary regulations of his District if he acts without permission).
 8. When the circumstances are such that joint ownership of pilot vessels becomes a local requirement, the Pilotage Authority may by by-law compel the pilots to form a number of distinct, independent partnerships based on the ownership of one pilot vessel and its operation (subsec. 329(c)).
- (b) *Contracting on the part of the ship* (i.e., Master, owner, agent or consignee):
1. Except in the special situation created by Part VIA which, as stated earlier, will be the subject of a special study, the ship is always at liberty not to enter into a contract, that is, not to hire a pilot, even where the compulsory payment system exists. If she has to pay dues, although a pilot was not employed, they are not the pecuniary consideration of a contract of hire but a condition imposed by law on vessels which navigate within district limits. This provision exists mainly to

induce vessels to hire pilots, thereby assuring them of sufficient work to enable them to maintain and improve their skill and qualifications, and at the same time providing them with a steady, reasonable income.

2. Except in one case, the ship has the right to choose the other party to the contract: in other words, to hire a pilot of her choice. Only a non-exempt vessel which intends to take a pilot on her inward voyage is required to accept the first pilot who answers her signal (sec. 349). No doubt this exception was dictated by the circumstances that existed when the legislation was first introduced. At that time ships had no means of communication with the land prior to entering district limits and therefore were not in a position to make a choice since they did not know which pilots were available and, even if they did, had no way of notifying a selected pilot sufficiently in advance to allow him to meet the ship in time. This lack of communications forced on pilots, in order not to delay ships, the strenuous duty of cruising day and night throughout the boarding area in all weathers. Under these circumstances, both in fairness to the pilots and for safety reasons, it was appropriate that the ship had to take the first licensed pilot who offered his services from the first pilot vessel. At that time it was a statutory offence for the nearest pilot not to answer a ship's signal for a pilot. There are, however, two exceptions which confirm the basic right of the Master to choose his pilot: first, the exempt vessel which requires a pilot on her inward voyage has the right to choose any of the pilots who offer their services (sec. 348); second, in the case of pilot boats jointly owned it was normally provided in the By-laws (and still could be provided) that the Master has the right to make a choice of those on board the pilot boat that answered the vessel's request (subsecs. 350(2)(b) and 329(c)). This principle had been officially recognized in the Quebec Pilots Corporation Act of 1860 (23 Vic. c. 123), which abolished the free enterprise system in Quebec but also confirmed the right of the Master on the downbound voyage to choose from those whose names appeared on the *tour de rôle* list at Quebec, and its 1869 amendment (32-33 Vic. c. 53), which extended this right during inward voyages by authorizing the Master to choose one of the pilots aboard the pilot schooner that hailed his ship (*vide Quebec District, Legislation*).
3. The ship is deprived of the right to negotiate the price of service and is bound by the rates fixed by the regulations. The

tariff cannot be varied by mutual agreement, even with the Pilotage Authority's consent, except by an amendment to the By-law.

4. In Districts where the payment of dues is compulsory, the contract of hire is completed when the non-exempted ship's prescribed signal for a pilot is answered by a licensed pilot. Then, whether or not the Master accepts the services of this pilot, the contract is valid and the pilot is entitled to his remuneration (sec. 349, subsecs. 350(2) and 351(1)(b)).
5. In any circumstances taking a pilot aboard voluntarily for the purpose of piloting the ship is an irrefragable proof of the Master's consent to the contract of hire and the pilot is entitled to his remuneration whether or not the Master allows him to pilot (sec. 352). Since by his action the Master consented to the contract, he can not prevent the contract from continuing by not permitting the pilot to provide his services.
6. Secs. 359 and 360 impose on ships the obligation to pay an indemnity to a pilot if he is over-carried after the termination of his contract, or if he is detained in quarantine.
7. To protect third parties, the owner and the Master are made civilly responsible for the acts of the pilot as if he were the direct employee of the owner (subsec. 340(3)). This provision applies whether or not the payment of pilotage dues is compulsory. Since it concerns civil legislation which might vary from province to province, this section of the Act makes a uniform rule applicable throughout Canada.
8. The Act makes the "owner, the master and the consignee or agent of any ship" liable to pay pilotage dues (the consignee and agent to the extent that they have on hand money received on behalf of the ship (sec. 341). The dues, which are the price of the pilotage contract, are owed to the pilot unless they have by regulation been made payable to the Pilotage Authority for collection purposes (sec. 343).
9. The contract is still valid even if the pilot, through circumstances beyond his control, can not act as pilot, that is, take charge of a ship's navigation, because he is unable to board. In that case, if the ship is led by another vessel with a licensed pilot on board, acceptance of this guidance constitutes a contract involving the same remuneration for the pilot (sec. 353).
10. The choice that the Master of a ship may make is limited to pilots holding a valid licence (subsec. 354(3)(b)).

LEGALITY OF SPECIAL PILOT SYSTEM

The "special pilot" system is permissible but only in a limited way. It is not permissible for non-exempt ships on their inward voyage to have special pilots because they are bound by law to take the first pilot who offers his services, and the system can not interfere with the right of the Master of another ship to choose any pilot who is available if such a right (which prior to 1934 was a statutory one) is contained in the District By-law. In other circumstances vessels may hire the same pilots every trip and the Pilotage Authority can not prohibit the practice under the existing provisions of Part VI.

PILOTAGE AUTHORITY AND PILOTAGE CONTRACT

The Pilotage Authority is merely a licensing authority with no power to operate or provide pilotage service. As is demonstrated later (vide C. 8, pp. 301-304) the function of licensing is at present incompatible with the function of providing pilotage service and the same authority can not perform both.

The Pilotage Authority can not be a party to a pilotage contract. It may enact regulations to assure the constant attendance of pilots as a condition of holding their licence, and make them liable to punishment for any infringement but it has neither the right nor the power either to control the service or to undertake to provide pilots. Conversely, no one has any recourse against a Pilotage Authority because damage was suffered due to the non-availability of pilots, nor any way of forcing it to make pilots available. By taking over the responsibility for despatching pilots the Pilotage Authorities have departed from this principle and have assumed a power, with its attendant responsibilities and risks, to which they have no right.

The compulsory pilotage system in the United Kingdom is simply a variation of the Canadian compulsory payment system. The principal difference is in the wording used rather than in the system itself. In the United Kingdom, it is not against the law to navigate without a licensed pilot. When Masters require pilots their only obligation is to employ licensed pilots; otherwise they are liable to a fine amounting to double the pilotage dues. As in Canada, no contract takes place when the ship does not require a pilot, even if the pilot offers his services. The pilot in the United Kingdom is not entitled to receive any part of the fine then imposed upon the non-exempt ship nor is the pilot in Canada entitled to any part of the dues then charged. In the United Kingdom, as in Canada, the pilot is entitled to the dues only when a contract took place or is presumed by law to have been made (secs. 349 and 350, and subsec. 351(2) C.S.A.).

In addition to the terms and conditions imposed by Parliament on pilotage contracts (which therefore are applicable throughout Canada), the

Act makes it possible to draw up special terms and conditions to fit particular local requirements. This could have been achieved through specific legislative provisions included in the Act with application to named Districts only (such as was the case of the four Districts of Quebec, Montreal, Saint John and Halifax up to 1934), but a simpler procedure was adopted. Parliament has delegated to the Pilotage Authority of each District the power to legislate by by-law on certain matters enumerated in the Act, mostly in sec. 329. When such legislation is passed and duly approved by the Governor in Council, it becomes law for the District concerned as much as the Act itself, provided the Pilotage Authority has acted within the limits of its powers as defined in the Act. This requirement has been repeatedly infringed. (This by-law-making power is studied in C. 8.) Except for fixing the amount of the pilotage dues, passing regulations to assure the constant attendance of pilots and providing for the settlement of disputes between Masters and pilots (i.e. compulsory arbitration) the Pilotage Authority has no authority to interfere with the freedom of either the pilots or the shipping interests to enter into contracts.

The actual situation, however, is that both the regulations and the facts are at complete variance with the system provided for in Part VI, that is, pilots exercising their profession as licensed free entrepreneurs competing for customers. Out of 24 Districts (excluding St. John's, Nfld.) governed by Part VI only three small Districts with a total of 12 pilots (in 1964) out of a grand total of 510 pilots pay their pilots the dues they earn, less any normal deductions. In all other Districts the pilots retain no liberty in the exercise of their profession and vessels can not select their pilots. The Pilotage Authorities eliminate choice by providing pilots through a tour de rôle or roster system. The result is that, to all intents and purposes, the pilots are employees of the Pilotage Authorities. Their remuneration is either a fixed salary or an equal share in the net revenue of their District and they are no longer allowed to receive directly the dues they earned, but a share of the dues earned by the group.

A review of the existing situation is most revealing. In the study below the name of the District is followed by the pertinent section or sections of the local By-law, the approximate number of pilots constantly available in 1964 and the number of trips or assignments, including movages and trial trips.

- (a) The pilots are independent contractors in the following Districts:
 - (i) *Prince Edward Island*—subsec. 5(2); 6 pilots, 109 vessels. There is neither despatching nor pooling because there is only one pilot per port and therefore no competition except at Georgetown, where it appears that the second pilot is a relief pilot. Traffic is light.
 - (ii) *Shediac* —subsec. 8(3); 3 pilots; total number of trips 20.

- (iii) *Pictou*—subsec. 8(3); 2 pilots; 32 trips. The second pilot appears to be only a relief pilot because he does very little work.
- (b) In the following Districts the pilots, pursuant to their By-laws, are the employees of their Pilotage Authority:
 - (i) *Humber Arm*—subsec. 8(2)(b); 3 pilots; 434 trips.
 - (ii) *Port aux Basques*—subsec. 8(2)(b); 1 pilot; 211 trips.
- (c) In Pugwash the By-law provides that the pilots are paid on the basis “of the money earned by each” but, in fact, they are paid through a pooling system. In 1964 the 3 pilots did 37 trips.
- (d) In the following Districts the basis for the pilots’ remuneration is not indicated in the By-law but it is obvious that they are paid through a pooling system because they receive equal shares:
 - (i) *Botwood*—subsec. 8(2); 3 pilots; 100 trips in 1963.
 - (ii) *Caraquet*—subsec. 8(3); 2 pilots; 68 trips.
- (e) In the following Districts the pilots are paid an equal share of the pool, the criterion being the time worked, i.e., the time they were available for duty:
 - (i) *Bathurst*—subsec. 8(3); 3 pilots; 54 trips.
 - (ii) *Bras d’Or*—subsec. 8(3); 3 pilots; 173 trips.
 - (iii) *Buctouche*—subsec. 8(3); 1 pilot; 17 vessels.
 - (iv) *Miramichi*—subsec. 9(3); 4 pilots; 397 trips.
 - (v) *New Westminster*—subsec. 10(3); 7 pilots; 1194 trips.
 - (vi) *Restigouche*—subsec. 8(3); 2 pilots; 280 trips.
 - (vii) *Richibucto*—subsec. 8(3); 1 pilot; n/a trips.
 - (viii) *Sheet Harbour*—subsec. 8(3); 2 pilots; 31 vessels.
 - (ix) *British Columbia*—subsec. 10(2); 70 pilots; 9,058 trips.
 - (x) *Churchill*—subsec. 5(2); 2 pilots; 118 trips.
 - (xi) *Halifax*—subsec. 9(3); 17 pilots; 3,760 trips.
 - (xii) *Montreal Harbour*—subsec. 46(2); 16 pilots; 7,156 trips.
 - (xiii) *Saint John, N.B.*—subsec. 9(3); 9 pilots; 1,664 assignments.
 - (xiv) *Sydney*—subsec. 9(3); 11 pilots; 1,965 assignments. In 1966 the Sydney pilots became employees of the Crown.
- (f) In three Districts the pilots are despatched by the Pilotage Authority according to a tour de rôle system but, according to the District By-laws, they are paid the dues they have earned. However, the pilots are actually remunerated through a pooling system operated by their own organization to which they all belong:
 - (i) *Quebec*—subsec. 9(1); 78 pilots; 9,018 assignments.

- (ii) *Montreal (River)*—subsec. 21(5); 123 pilots; 19,568 assignments.

The By-law makes the dues payable direct to the pilots' association, that is, the United Montreal Pilots.

- (iii) *Cornwall*—sec. 9; 34 pilots; 2,724 assignments.

COMMENTS

The general situation is that Canadian licensed pilots are no longer the free entrepreneurs intended by the Act but *de facto* employees of their Authorities. When the Sydney pilots agreed in 1966 to become employees of D.O.T. the only material change in their status was that they gained in security by being given a fixed salary which guaranteed them a stable income, a better pension scheme and other fringe benefits. Although the legal position of the Montreal River pilots and of the pilots in the Quebec and Cornwall Districts appears to be basically different, there is, in fact, no difference. In the other Districts, the pool of the pilots' earnings is imposed by the By-law and is operated by the Authority while in these three Districts the pool is operated, with the Authority's knowledge, by the private organization to which all the pilots of each District belong but, as elsewhere, the pilotage service is controlled by the Authority and the pilots are assigned through a tour de rôle system.

The existing situation is totally incompatible with the principles on which the organization of Part VI is based and, furthermore, the pilots and the shipping interests are denied the exercise of what appear to be basic rights guaranteed by the Act, that is, the pilot's right to the free exercise of his profession, and the ship's right to choose a pilot. It is, however, pertinent to note the fact that although under the law both have uncontested rights, neither group in appearances before this Commission requested, or even suggested, a return to the free enterprise system. No complaint whatsoever was voiced by the pilots, with the exception of some dissidents in the St. Lawrence Districts who objected, not because they were in favour of free enterprise, but because they claimed there were abuses by the pilots' organizations (to which they sometimes did not belong) in the control of pooling. The shipping interests did not condemn the existing system and the question of free enterprise was raised neither by the Vancouver Chamber of Shipping, nor by the Shipping Federation of Canada, Inc., nor by any of the other organizations representing shipowners. Some individual operators complained about some of the disadvantages of the tour de rôle system which, they felt, had reduced the quality of the service they formerly received from their special pilots to the level of the less qualified pilot. However, it was against the lack of flexibility of the tour de rôle system that they complained rather than the loss of their basic right to choose their pilots. The Irving interests in Saint

John, N.B. objected especially to one pilot in whom they had no confidence for the difficult assignment of conducting their vessels through the Reversing Falls on the Saint John River. No doubt they would have been quite satisfied with a grade system which gave assurance that such difficult assignments would be reserved for pilots with the highest qualifications and with an unblemished record. Other companies regretted the loss of their special pilots (although they recognized that the Grade A pilots who were assigned to their passenger ships and large vessels were their former special pilots) but no one advocated a return to the free enterprise system of Part VI which entailed, however, the obligation for their ships on their inward voyage to take the first pilot who offered his services.

This extraordinary apathy on the part of both the pilots and the shipping interests toward the loss of the rights guaranteed to them by the Act can only be explained by the fact that these rights no longer correspond to the realistic needs of the service and that, therefore, those provisions of Part VI which are based on them are no longer adequate.

BACKGROUND OF EVOLUTION TO CONTROLLED PILOTAGE

The present situation developed through a long process that was progressively dictated by the common interests of all those involved in providing an efficient and reliable pilotage service. It started in the St. Lawrence River Districts of Quebec and Montreal about 30 years prior to Confederation when pilotage operations on the St. Lawrence River were the most extensive and the most important in Canada. Piloting the small sailing vessels of that era involved several days compared with the few hours required for pilotage in harbours. The pilots had to be highly qualified and their full attention was required the whole time ships were under way.

There were many more pilots on the St. Lawrence than in any other pilotage area of what is now Canada; in fact, more than in all the other pilotage areas combined. There were three reasons for this situation: the large number of ships requiring pilots on the River, the time involved in the majority of trips and the fact that since pilotage was a free profession there was no ceiling on the number of pilots. The resultant oversupply led to sharp competition under the prevailing system of free enterprise and unfair practices developed to the detriment of both the pilots and the shipping interests. In order to seize the first opportunity to offer their services to incoming ships, the pilots from Quebec—and even on occasion from Montreal—would venture into the Gulf of St. Lawrence beyond the Bic boarding area in frail, privately-owned pilot vessels. The loss by drowning of 48 Quebec pilots in the exercise of their profession prior to 1860 emphasizes the hardship and danger to which they were exposed.

Ships also suffered from the unreliable service and were frequently delayed. In adverse weather very few pilots would venture to sea; small, slow sailing ships did not provide attractive employment and Masters were liable to find no pilot when they entered the boarding area; often there was no pilot vessel in the boarding area to disembark pilots from ships bound for sea. Furthermore the rash nature of the pilots who ventured far out into the Gulf in defiance of the regulations was no guarantee of their reliability and their qualifications. This system gave little encouragement to the law-abiding pilots because it gave the pilotage of upbound ships to the most venturesome pilots and afforded greater opportunities to unscrupulous pilots to bribe Masters and thus obtain pilotage downbound for themselves or their friends.

The St. Lawrence pilots soon realized that their interests and those of the service required the abolition of the free enterprise system. They sought authority to act as a group to control the exercise of their profession and to provide pilotage service. However, it cost them many years of hardship and many concessions to the shipping interests before the *Quebec pilots* could secure this reform in 1860 when Parliament, by a special Act, created a professional Corporation with powers to control the pilots and to provide service. The Pilotage Authority remained as before, i.e., a licensing authority only with limited control over the Corporation's power to make regulations. This marked the end of the free enterprise system for the pilots in what was to become the Pilotage District of Quebec. It was never reinstated, in fact, if not in law (vide C. 1, p. 13).

As far as the shipping interests were concerned the evolution took one hundred years to complete in the Quebec District, i.e. when the special service pilot system was abolished in 1961. In 1860 the pilots had made two concessions to the shipping interests: first, they gave Masters the right to refuse an assigned pilot and to choose in his place anyone else available at the time; second, they conceded to the Montreal Oceanic Steamship Company the right to have special pilots.

These privileges were to be the main cause of disagreement between the shipping interests and the pilots and even among the pilots themselves because they made a tour de rôle system unworkable, with the result that it was inequitable for the pilots to share the net earnings of the Corporation on an equal basis. The majority of the pilots made repeated representations to have these privileges withdrawn while, on the other hand, the shipping interests fought to have the Corporation abolished. The shipping interests were at first successful. Because of (a) abuses by some of the officers of the Pilots' Corporation, (b) nepotism that developed as a result of the control the Corporation had over admissions into the service, and (c) a series of disasters for which the pilots were found to blame, the shipping interests gradually succeeded in their aim. First, in 1904 the Quebec Harbour Commissioners were replaced as Pilotage Authority by the Minister of Marine

and Fisheries. The final step was taken on the recommendation of the Lindsay Commission whose very scanty report contained a majority opinion recommending abolition of the Pilots' Corporation and a return to the free enterprise system. The report also condemned the pooling system as "pernicious". An Act of Parliament passed in 1915 deprived the Pilots' Corporation of all its powers except those concerning the trusteeship of the Pilot Fund. However, the profession did not return to free enterprise; instead, control of the pilots and pilot vessels was transferred to the Minister, as such, and not in his capacity as Pilotage Authority. The Minister continued to exercise these powers up to 1934 when the relevant sections of the 1927 Canada Shipping Act were deleted. In theory, the 1934 amendments enabled the pilots to practise their profession freely as they had prior to 1860 but, in practice, ultra vires by-laws handed this power of control to the Minister as Pilotage Authority. He has exercised them ever since.

The right of the Master to choose his pilot, as approved by the 1860 Act, was soon abolished and was replaced by the special pilot system which developed to such an extent that all regular lines employed special pilots and thus left very little work for the other pilots. The Pilotage Authority itself had the system abolished in 1961 because it amounted to a denial of the Authority's assumed despatching function and was detrimental both to the efficiency of the service and to the standard of qualification of the pilots as a group. Since that time all the Quebec pilots have been despatched in turn according to the grade they hold. Pooling has continued without interruption. After the 1915 Act was passed the Minister collected the dues but paid them over to the Corporation instead of to the individual pilots. In 1920 after the Privy Council confirmed in the Paquet case that the 1915 Act had deprived the Corporation of all its powers over the pilots' own earnings, the pilots entered into a private partnership to which they all belonged for the purpose of pooling their earnings. Since that time every new pilot has joined the partnership and the pilots' earnings have been shared. (See Quebec District.)

The *Montreal pilots* also suffered from the inconveniences of the competitive system. As early as 1850, they tried to obtain control over the service; instead, they were incorporated by Parliament but had no power to control either the service or their earnings. They refused to activate the Corporation by not attending the first meeting. They kept up their opposition and finally in 1873 obtained an unofficial agreement which gave them the right to despatch by a *tour de rôle* the pilots who were not employed as special pilots. They also gained a kind of association status in the form of a pilots' committee which they elected to supervise their affairs, especially despatching. This is no doubt the origin of the Pilots' Committee provided for in the By-laws of all the main Districts. In Montreal, as in the Quebec District, the different status of the special pilots and the *tour de rôle* pilots caused constant friction and frequent disputes. Furthermore, the Pilotage Authority (at that time the Montreal Harbour Commissioners) illegally took over control of the pilots by making

the despatcher its employee although he was paid out of the pilots' revenue. On two other occasions the pilots tried to obtain the type of incorporation the Quebec pilots had been granted in 1860. In 1897, when their private Bill that had passed the Commons was defeated in the Senate, the pilots went on strike. They returned to work when a Royal Commission was set up to investigate their grievances. One result of the Commission was that in 1903 the Montreal Harbour Commissioners were replaced as Pilotage Authority by the Minister of Marine and Fisheries. Although it had no other authority than the apparent consent of the pilots, the Pilotage Authority continued to control the service by operating a despatching system (except for the special pilots). The Montreal pilots also formed their own association for the purpose of pooling their earnings. The special pilot system was abolished in 1960 and replaced by a compulsory despatching system for all pilots based on tour de rôle and grades. Therefore, the situation at present is the same as in the Quebec District. (See Montreal District.)

The free enterprise system still existed in the *Saint John, N.B., District* when the Robb Commission made its investigation in 1918, but by that time it had been reduced to a bare minimum. Because of conditions in the boarding area the pilots had been obliged to group themselves into companies capable of owning and operating suitable pilot vessels. Free competition continued among these partnerships but at the time of the Robb Commission there were only two such companies competing for vessels. The Commission found that the competitive system was detrimental to the efficiency of the service and that it was causing vessels unnecessary trouble and litigation because both pilot vessels frequently claimed to have been the first to speak to the incoming vessel. The Robb Commission recommended that the pilot boat service be furnished by only one suitable vessel supplied by the Crown. The effect of this change would be to end the competitive system and, therefore, to place the Authority in control of the pilots and of the pilotage service. The pooling of earnings would then automatically follow. This recommendation was immediately implemented by the Minister who became Pilotage Authority to replace the corporation type of Pilotage Authority formerly provided specifically for the Saint John District in the Canada Shipping Act. Thereafter, pilot vessel service was provided by the Pilotage Authority and the last vestige of the free enterprise system disappeared. The same system was established in the *Halifax District*.

However, some of the other Districts had already suppressed the competitive system. Although special research was not undertaken to determine the various steps taken in each District, the 1899 New Brunswick Supreme Court decision referred to above (Attorney-General of New Brunswick v *Miller et al*, 2 N.B. Equity Reports, p. 28) indicates that there had been no competition for many years in the Miramichi District. This District had been and still was very active. Prior to 1882 there were over 30 pilots as is shown

by the By-law provision that no more apprentices would be licensed as pilots until the number of pilots was reduced to 30. The judgment refers to sec. 13 of the By-law which provided that the pilots should each year appoint one of their number whose duty it should be to arrange the turns in which the pilots should do duty, and to attend to some other minor matters, and that he should receive for his services a share of the net proceeds earned by the pilots which, by sec. 20, were to be divided equally among the licensed pilots at the end of each year.

When the *British Columbia District* was reinstated in 1929, the Minister became the Pilotage Authority. He took over control of the pilots and imposed the pooling system by by-law. The same system was gradually extended to every Pilotage District with several pilots. The regulations prohibited the pilots from acting as free entrepreneurs; instead, the Pilotage Authority assumed control of the service and despatched the pilots. Furthermore, in all these Districts (except the St. Lawrence River Districts) the Pilotage Authorities imposed and operated exactly the same pooling system that the Lindsay Commission found to be so pernicious that they recommended it be denied. It was and still is denied by the regulations to the Quebec District pilots and their fellow pilots on the Upper St. Lawrence, i.e., in the Montreal and Cornwall Districts.

As for the pilots, they generally claim that their legal status is self-employed, private contractors but, in practice, they try to have the best of both worlds by agreeing to be considered employees when this status is to their immediate advantage. They state they are self-employed in order to establish the right to claim professional expenses as an income tax deduction but, on occasion, do not hesitate to call themselves employees in order to qualify for provincial workmen's compensation or for employer-employee group insurance plans (life, accident, health, superannuation, etc.). In most Districts the pilots are granted annual leave, sick leave, "on full pay" or "with half pay", which is incompatible with the status of private contractors whose income is derived from services rendered.

The procedures followed by the Pilotage Authorities to implement the Canada Pension Plan illustrate their uncertainty about the status of the pilots. Of the 25 Districts under Part VI C.S.A. the Authority in 7 Districts treats the pilots as its employees, deducts half the contribution from the pilots' earnings and pays the other half from District revenues as a District operating expense:

- (a) the four Newfoundland Districts, Botwood, Humber Arm, Port aux Basques and St. John's;
- (b) the Commission Districts of New Westminster and Restigouche River;
- (c) the Sydney District from the date the pilots became employees of D.O.T.

On the other hand, in the remaining commission Districts (information is not available for Richibucto because the Pilotage Authority of that District did not reply to this Commission's query) and in all the Districts, except Sydney and Churchill, where the Minister of Transport is the Pilotage Authority, the pilots are treated as self-employed persons. However, many of these Districts help their pilots by making the necessary deductions at source but, since this is a personal service, the Authority will not necessarily assist, e.g., in the Montreal District deductions are made for the river pilots but not for the harbour pilots. In Churchill since the pilots are also employed by the Government as port wardens, their full contribution to the Plan is dealt with under this status, the Department of Transport paying half the maximum contribution, the other half being deducted from their salary as port wardens (Exhibit 1500).

EQUIVOCAL STATUS OF PILOTS

Nevertheless the illegal powers over the pilots and the pilotage service which the Pilotage Authorities have usurped have not altered the legal status of the pilots who are licensed under Part VI, i.e., self-employed, independent contractors. Since the definition of their status determines their rights in relation to the Authority, or an insurance company or any other third party, it may be anticipated that the courts will refuse to allow a claim based on an ambiguous status, on the ground that the burden of proof rests on the claimant. For instance, it can be foreseen that the courts would uphold a refusal by an insurance company to pay an indemnity provided in a policy because of a material defect in the contract if the pilot's status as an employee is a warranty of the policy. Again, a pilot who thinks he has ample protection under a provincial workmen's compensation plan may, when incapacitated, find he is unprotected and without a claim if the plan is open to employees only. In the Humber Arm District ex-pilot Dyke saw his claim for a full share of the pilotage dues dismissed by the Supreme Court of Newfoundland not because his assertion that he was self-employed was incorrect but because the court found that he had acquiesced in the Authority's illegal practice of treating its pilots as employees. (Supreme Court of Newfoundland in circuit at Corner Brook, 1955, No. 63, *Nathan Dyke v the Pilotage Commission of Humber Arm.*)

PILOTS' ORGANIZATIONS

A. PILOTS' COMMITTEES

After the Pilotage Authorities assumed control of the pilots and the pilotage service they needed to communicate with the pilots as a group. For this purpose they resorted to the formula of a *Pilots' Committee* that the

Montreal pilots had introduced in 1873. The existing By-law of nearly every District² with a number of pilots contains provisions regarding the formation and the function of the Pilots' Committee. It is generally a group of five pilots appointed annually by their fellow pilots whose function is to provide liaison between the pilots, individually or as a group, and the Pilotage Authority. Nowhere in the regulation-making power of the Pilotage Authority is there the right to create such a Committee and to vest it with any power whatsoever which would have a binding effect upon the pilots, either individually or as a group. Therefore, these By-laws are null and of null effect, as if they did not exist, and at present the various Pilots' Committees have moral authority only.

However, all the Pilots' Committees have been very active and have played essential rôles: they have looked after the professional interests of the pilots; they have acted as the pilots' representatives in discussions with the Pilotage Authority about organization, fixing the tariff, working conditions, etc.; they have both represented the pilots and served as experts in pilotage when pilot candidates were examined; they have advised the Pilotage Authority on disciplinary matters. These Committees are necessary. Even if the pilots were to return to the free enterprise system, the Committees would form professional councils. Their rôle increases in importance to the point of necessity if the Pilotage Authority controls the service and the pilots' earnings.

But a Pilots' Committee will not serve the purpose unless (a) the matters to be attended to and the problems to be discussed are of a local character concerning only one District, and (b) the Pilotage Authority limits its activities to licensing or, if it has undertaken to control the service, operates not only despatching but also the pooling of the pilots' earnings.

If a District is isolated and both despatching and pooling are effected by the Pilotage Authority, as is done, *inter alia*, in the Districts of British Columbia, New Westminster and Saint John, N.B., or if the pilots are the Pilotage Authority's employees, the Pilots' Committee system is reasonably adequate to protect the pilots' interests as far as administration, working conditions and remuneration are concerned because these are all controlled by the Pilotage Authority.

In spite of the formation of local Pilots' Committees, the pilots have developed their own organizations in the Districts where all these conditions did not exist, i.e., in the St. Lawrence River Districts (Cornwall, Montreal

²The By-law of the following Districts which come under Part VI C.S.A. contains a provision that a Pilots' Committee is to be appointed by the pilots:

British Columbia—sec. 5

New Westminster—sec. 5

Cornwall—sec. 5

Montreal (river pilots—sec. 20)
(harbour pilots—sec. 45)

Quebec—sec. 5

Saint John, N.B.—sec. 5

Halifax—sec. 5

Sydney—sec. 5

(River) and Quebec) where the Pilotage Authorities controlled both the service and the pilots by taking charge of despatching but, on the other hand failed to impose and operate the pooling of the pilots' earnings.

When the free enterprise system prevailed, the Pilotage Authority had no responsibility for seeing that each pilot had an equal share of the workload and of the earnings; all that was required was to provide equal opportunities and the onus was then on the individual pilot to take what advantage he wished of the situation. But when the Pilotage Authority undertook to distribute the work among the pilots it also assumed the obligation to make an equitable distribution both of the workload and of the earnings. Equal workloads do not necessarily produce equal earnings because most tariff charges are based on a number of variable elements, i.e. draught, tonnage and distance. An assignment in a small, slow ship will take much longer and will yield less than an assignment in a large, fast ship for a similar voyage. There are also causes of delay over which a pilot has no control such as fog, engine break-down, unavailability of berth, etc., which result in further inequalities. All these disparities can not be equitably solved by a despatching system, no matter how sophisticated, unless it is accompanied by pooling. Therefore, the normal scheme adopted by most Districts is to base assignments on tour de rôle, to pool earnings and to share the pool on the basis of each pilot's time available for duty.

B. PILOTS' ASSOCIATIONS AND CORPORATIONS

Where the Pilotage Authority is in charge of despatching but fails to operate a pooling system, the Pilots' Committee can not intervene to organize a pool because it lacks the necessary legal power over the pilots' earnings. The only alternative to compulsory pooling imposed either by the Authority or by legislation is for the pilots as a group to organize pooling. Since one of the aims of pooling is to ensure that all the pilots in a given District are treated alike, i.e., share both workload and earnings, the participation of all the pilots is a prerequisite. Otherwise, different procedures will cause dissension and anxiety among the pilots, to the detriment of the efficiency of the service and its administration. One solution is to draw up a civil partnership agreement whereby the pilots bind themselves for the duration of the contract to pool and share their earnings as stated in the contract. The pilots who were first faced with this situation adopted this course of action, and originated the first and only pilots' associations in Canada, i.e. the *Association of the Licensed Pilots for the Harbour of Quebec and Below* and the *United Montreal Pilots*.

As seen earlier, in the Quebec District when in 1920 the Privy Council judgment in the Paquet case confirmed that the 1860 Quebec Pilots Corporation had been legally deprived of its statutory right to control pilotage earnings by the Act of Parliament passed in 1914, and when the Pilotage

Authority took over from the Corporation the despatching of pilots as well as the collection of pilotage dues and amended its By-law to specify that the dues so collected would be paid directly to the pilot who had earned them, the Quebec pilots unanimously entered into a partnership agreement similar to the one under which the Montreal pilots were already operating. The two main aims were to provide the advantages and protection enjoyed by their confrères in the other Districts where the Pilotage Authority operated a pooling system based on availability for duty and where the share in the pool was not affected by absences due to illness. The third aim (the second listed below) was secondary and might well have been achieved by other means, *inter alia*, by a group insurance policy, as is done in certain Districts. The three aims are as follows (translation) Ex. 592A:

- “1. The administration, collection and distribution by shares of pilotage earnings which will be pooled.
2. The payment of an indemnity to suspended pilots.
3. The payment of illness assistance. All three in accordance with stipulated conditions.”

The 1920 Partnership Agreement contained a clause (clause 13), which is still retained, to the effect that the obligation for the pilots to pay over their earnings to the Association would cease if ever the pilots became Crown employees at a fixed salary.

The first contract was called the *Acte d'association de l'union des pilotes licenciés pour le havre de Québec et au-dessous*. In 1924 the name was changed to read *L'Association des Pilotes Licenciés pour le Havre de Québec et en Aval*—*Association of Licensed Pilots for the Harbour of Quebec and Below* (Ex. 592). A later agreement extended the life of the contract to May 21, 1980. The 1920 deed contained a clause to the effect that it would become operative only if and when all the pilots then on strength joined the Association. They all did, as have all those who have been licensed since.

The situation now is that the Quebec pilots operate the pooling system and the Authority controls despatching. However, the Authority has always worked closely with the Pilots' Committee (the Board of Directors of the Association and, since 1961, of the Corporation as well) in drafting the despatching rules. This co-operation has had the effect of placing despatching and pooling under the same authority, as it should properly be.

The same causes had the same results for the Montreal District river pilots. As seen earlier, in 1875 the Montreal pilots had obtained unofficially the right to operate the despatching system and they had instituted pooling. Despatching was taken away from them a few years later when their despatcher became the employee of the Pilotage Authority. In 1903 when the Minister replaced the Montreal Harbour Commissioners as Pilotage Au-

thority he continued, through his staff, to be responsible for despatching but pooling was left to the pilots. The partnership agreement that now governs the Montreal river pilots called *United Montreal Pilots*, dates from December 27, 1918 (Ex. 771). Its aims are listed in clause 3 which reads as follows:

(Translation) "3. The object of the partnership and the aim for which it is formed are the association of their respective interests in the exercise of pilotage, placing in a common fund the amounts that may be owed or paid to any of them as fees or as the price of services performed as a pilot, except the amounts owed or paid in the form of a bonus; the collection of such amounts, the administration of this common fund, and sharing among the partners the amounts so pooled, in whole or in part, after all administrative expenses have been deducted. The partnership may also attend to any business concerning the interests of its members in the exercise of their profession as pilots, their protection, their promotion and their defence, but in conformity with the legislation governing these matters and the regulations established by the competent pilotage administration".

All the river pilots have subscribed to the agreement. The deed's duration, as extended in 1943, will expire December 27, 1968.

The creation of the Pilots' Corporations was merely a further development of the same situation. The pilots were urged by their legal adviser to adopt the corporation system by which, they were told, the same aims could be achieved but many substantial advantages would be gained. Some of these were listed in a letter dated March 18, 1960, addressed to the Quebec Association by their legal adviser (Ex. 676) which can be summed up as follows:

- (a) A corporation has a legal existence distinct from its members who are not responsible personally for any wrongdoing of the corporation as is the case if they form an association.
- (b) With the type of corporation envisaged (i.e. under Part II of the Canada Companies Act), there was no question of succession duties because the members have no share in the assets of the corporation.
- (c) The existence of a corporation is unlimited, while the existence of an association must be limited to a certain period of time since it derives from a contract. Such permanency is important to keep the members together and to preserve their group assets.
- (d) Incorporation is a prerequisite to the establishment of a truly professional organization with wide powers to govern the profession. The type of organization proposed is a step in that direction.
- (e) Corporation law is less rigid than the Quebec Civil Code which applies to a deed of association.

The legal adviser further suggested incorporation under a federal Act rather than a provincial Act because pilotage is a federal matter³. He pointed out that the ideal situation would be a special Act of Parliament, like the 1860 Act which incorporated the Quebec pilots, but he added that “the climate in Ottawa” was not propitious at that time.

The pattern was set by the groups of pilots who were faced with the same problems but had not yet formed partnerships. The first charter of this kind was granted on April 19, 1956 to the *Corporation of the St. Lawrence-Kingston-Ottawa Pilots* (Ex. 806) which was to serve as a prototype for the others to come. Its purposes are as follows:

- (a) to promote the practice and the progress of the profession of pilot in the interest of the members of the Corporation and the interest of navigation generally, in the St. Lawrence-Kingston-Ottawa Pilotage District and in any other district or region where the members of the Corporation may be authorized to practice their profession;
- (b) to provide an efficient pilotage service for navigation;
- (c) to establish and regulate the pooling, the collection, the administration among its members, of all or part of the money which may be due or paid to any of them for their services as pilots;
- (d) to undertake and to pursue the study of questions of common interest to the members and to take as a result thereof, in any Province of Canada, any step or measure not contrary to law;
- (e) to represent its members in any Province of Canada with government authorities, shipping companies, any public or private bodies, and any person;

All the pilots in the District joined the Corporation and signed a power of attorney authorizing it to receive payment of their pilotage earnings. In 1961, consequent upon the division of the St. Lawrence-Kingston-Ottawa District into the Cornwall and Kingston Districts, the name of the pilots Corporation was changed to *Corporation of the St. Lawrence River and Seaway Pilots—Corporation des Pilotes du Fleuve et de la Voie Maritime du Saint-Laurent* (Ex. 806) now composed of only the Cornwall pilots. The Kingston pilots also founded their own Corporation in 1961. (Because Kingston is part of the Great Lakes organization, its pilots' Corporation, as well as others existing on the Great Lakes, will be studied in the Commission's Report on Great Lakes Pilotage.)

³This however is not the basic criterion for granting charters under Part II of the Canada Corporations Act (then called “Companies Act”) (1952 R.S.C., c. 53). Sec. 144 defines the conditions for the issuance of such charters and one of those is that it ought to be “for the purpose of carrying on in more than one province of Canada, without pecuniary gain to its members, objects of a...professional...character...” This limitation might well void any charter so obtained if it is established that the terms used in the application for incorporation are not absolutely correct on this essential point.

The next group to be incorporated was the Montreal harbour pilots, as soon as they became a separate group (on July 23, 1957, P.C. 1957-987) within the Montreal District. The charter is dated January 2, 1958 under the title *Corporation of the Montreal Harbour Pilots—Corporation des Pilotes du Port de Montréal* (Ex. 792). It contains the same five aims as above listed to which was added a sixth:

“To regulate the practice of pilotage by its members within the limits authorized by law”.

It is strange that the harbour pilots took this action because there was no need for it since the Pilotage Authority had bound itself in its By-law (subsec. 65(2) as amended in 1957, subsec. 46(2) of the present By-law) to operate pooling as well as despatching and to distribute the pilotage fund “on the basis of time worked by each (harbour pilot)”. It is doubtful that this Corporation has the power to organize and operate a pooling of the pilots’ earnings in view of the proviso in the charter which nullifies any of the Corporation’s powers if they come into conflict with the District By-law. It appears that one reason was that some of the first harbour pilots were former river pilots who were accustomed to attending to their own pooling, and, no doubt, there was also a desire to make the organization conform with the other St. Lawrence Districts.

All the harbour pilots have joined the Corporation and, at the same time, have provided the Corporation with the usual power of attorney authorizing it to collect their pilotage earnings (Ex. 793). Upon receipt of these powers of attorney in 1958, the Pilotage Authority ceased to operate a system of sharing earnings and twice monthly ever since has remitted to the Corporation all the dues it has collected. When the Commission asked the Department of Transport why the By-law provisions on this subject were retained a letter dated January 12, 1967 (Ex. 1501(a)) stated, *inter alia*, “The Montreal Pilotage District General By-law was extensively revised in October 1961 but this opportunity to have the provisions of the by-law reflect the practice was overlooked”. This, however, is only a practical solution which would have to be abandoned if, for any reason, some powers of attorney were either revoked or not furnished.

The Montreal river and Quebec pilots then reviewed their situation and concluded that the various By-laws of their Associations needed revision. The majority of the pilots were convinced by their legal adviser of the advantages of the corporation system as compared to a partnership and decided to be incorporated. On February 2, 1959, the Montreal river pilots obtained a charter under the name of *Corporation of the Mid-St. Lawrence Pilots—Corporation des Pilotes du Saint-Laurent Central* (Ex. 773) and on May 9, 1960, a charter was granted to the Quebec pilots under the name of

the *Corporation of the Lower St. Lawrence Pilots—Corporation des Pilotes du Bas Saint-Laurent* (Ex. 672). The Quebec charter contains one additional aim:

“(d) control of the education, training and apprenticeship of persons who wish to become pilots and members of the Corporation, within the limits authorized by law;”

(There is a similar aim in the B.C. charter.)

Effectiveness of Pilots' Associations and Corporations

The intention was to replace the Associations of Pilots in Quebec (Ex. 592) and Montreal (Ex. 771) by the new Corporations but a number of pilots in each District refused to join the Corporations. In 1963, these dissidents, as they are locally called, numbered six in Quebec and eight in Montreal. Since the Corporations are powerless to exercise any authority over non-members and their earnings, and, therefore, to enforce complete pooling, the problem was temporarily solved, first by keeping the Associations alive, and then by making the Associations' own decisions, actions, and by-laws automatically those of the Corporations. This was contrived by the dubious process of amending the terms of the Associations' deeds to that effect by a majority decision, a procedure authorized in the deeds. Such a procedure is of doubtful validity in that it leaves the terms of a contract to be determined and varied at the entire discretion of a third party, i.e. the Corporation which, furthermore, is controlled by some of the parties to the contract but not all of them. The resulting situation is also objectionable on the standpoint of legality in that, since the aims and powers of the Corporations are much wider than those of the Associations, not only can the clauses and modalities of the partnership agreement be altered by this process but even the nature of the contract can be modified. For instance, the dissident pilots could be subjected to the jurisdiction of professional, disciplinary tribunals which the Corporations created by their by-laws.

The association deeds as well as the letters patent of these Corporations are, however, nothing more than makeshift solutions to enable the pilots to operate a true pooling system. If pooling is not operated and imposed by the Pilotage Authority (provided that it can legally do so), the only adequate solution is to pass legislation granting these powers to a *sui generis* pilots' Corporation, as was done when the Quebec pilots were granted their first incorporation in 1860. In addition to creating the Corporation the 1860 Act imposed an automatic and compulsory membership and made all pilotage money assets of the Corporation, including the remuneration derived by the pilots from their services.

Neither deeds of association nor any provision of Part II of the Canada Corporations Act can assure a complete membership because there appears to be no legal means to compel anyone to join either an association or such a

corporation against his will, nor to remain a partner or a member if he elects to withdraw. Since an association is a partnership contract, it is the essence of such a contract that one may withdraw whenever he wishes, subject however to the liability to pay the other partners any damages he may have caused them by violating his contractual obligations.

The Corporations also have no legal power to force anyone to become a member. Conversely if a person wishes to join, the Corporations are not obliged to accept him, even though the applicant is a licensed pilot following his profession. Any member is always liable to be expelled by a decision of the Corporation. Furthermore the provision contained in all the By-laws, which denies a member the right to resign unless he also ceases to be a licensed pilot, seems to be of doubtful legality. It is true that by virtue of subsec. 145(2)(f) of the Corporations Act, the By-laws of the Corporation may provide "whether or how members may withdraw from the Corporation". However, the Corporations Act is federal legislation and falls under the application of the Canadian Bill of Rights (S.C. 1960, c. 44) which guarantees, *inter alia*, the freedom of association (sec. 1 (e)) and by way of consequence the right to cease to associate when one so elects. Furthermore it appears that by making such a regulation the Corporations arrogate a right that belongs exclusively to the Pilotage Authority, because they add a condition to the pilot's licence which can be done only by a by-law made by the Pilotage Authority pursuant to subsec. 329(f) of the Canada Shipping Act. But even if such a by-law were valid, the Corporation still can not force membership, nor can a pilot who has joined be assured of permanent membership.

There seems to be a further substantial deficiency in the constitution of these Corporations in that whatever rights they may have over their members' pilotage assets are not derived from their own powers and would be essentially revocable.

In the case of the Associations the legal situation is clear, because their rights are derived from the partnership deed and the members, by contract, have bound themselves to pool their earnings, subject to the terms and conditions expressed in the deed. This is not so, however, with the Corporations. The legal situation seems to be one of two alternatives: either the whole operation is illegal or their rights to dispose of pilots' money are essentially revocable.

A person can not be deprived of his assets (including pilotage earnings), or even of their free enjoyment except by a specific provision contained in legislation or by an agreement freely undertaken in his capacity as an owner. The provisions of subsec. 329(b) 1952 C.S.A. and of subsec. 319(l) 1934 C.S.A. (still in force) are examples of the first category; special provisions in the Act were necessary to empower the Pilotage Authority to fix what part of the pilot's earnings would belong to the operator of the

licensed pilot vessel and what part would be compulsorily deducted as his pilot fund contribution. The deeds of partnership are an illustration of the second category.

Whatever powers such a Corporation has, *per se*, must be founded on a provision of the Act under which it was created, i.e. Part II of the Corporations Act as limited by the terms of the charter. There is nothing in the Corporations Act which grants such Corporations powers to deal with their members' own assets without their consent; the fact that the assets are pilotage earnings makes no difference and a consent on the part of the owner of the assets is a prerequisite. It therefore presupposed a civil contract between the Corporation and its members, which is indicated by the necessity of obtaining the power of attorney.

What is the nature of that contract? It can not be said that it is an implied general assignment of pilotage earnings because the Corporation would then become the owner of such assets, and would be precluded by its charter from paying any part of them to its members.

The situation is hopelessly illegal unless it is looked upon as a combination of corporate and contractual powers. By its charter the Corporation is authorized to act as trustee for the administration of a fund belonging to its members; the exercise of such a power presupposes first, a partnership agreement among the pilots and secondly, a trust agreement between the Corporation as trustee and its members as both contributors and beneficiaries. These two contracts need not be in written form, they may be verbal. They are implied from the actions of the members when they define the terms of these contracts through the medium of by-laws (although they are *ultra vires* as far as the Corporation is concerned), to which they voluntarily submit themselves. In any case, pilotage money belongs at all times to the pilots and the Corporation has nothing more than a contractual power of administration which is essentially revocable.

Joining a Corporation can not result in a member's blanket, irrevocable surrender of his pilotage assets so that the Corporation may dispose of them at the discretion of the majority of its members. The argument to the effect that a member acquiesced when he joined the Corporation because he knew the contents of the By-laws is without value since by-laws are binding on the members only if they are *intra vires*.

The legal consequences could, therefore, be quite different to those the pilots envisaged when they selected the corporation system. As far as their personal liability is concerned they are still governed by a partnership agreement and the fact that it is implied does not alter the situation. The Corporation and its Board of Directors are answerable to each member for administering the trust fund and may be called upon to reimburse any deduction made from the share of any pilot without his consent, either expressed or implied.

Furthermore, the situation also leaves much to be desired because there is nothing to prevent the proliferation of such associations and corporations. There is no existing legal provision that could grant any one of them any exclusive or superior rights. The ensuing chaotic situation can not but cause dissension and conflict, as has happened in the case of the Quebec pilots and Montreal river pilots.

In the Maritimes and on the West Coast, the Commission found, through the evidence adduced at the hearings held in these areas and by meeting a great number of local pilots, that harmony and unity existed. By contrast, dissatisfaction and distrust were evident among the pilots of the St. Lawrence Districts and in the Quebec District there was open opposition and even hostility. This appears to be the normal consequence of the unsatisfactory status of exception that the Saint Lawrence Pilotage Authorities have imposed on these three Districts and the inadequate and unsatisfactory legal means at the pilots' disposal to remedy the situation.

In the Quebec District, two pilots filed individual briefs denouncing the abusive powers wielded by the Corporation, Captain Maurice Koenig (Ex. 571) and Captain Lucien Bédard (Ex. 1323). Later on, 21 pilots presented a written petition protesting against the existing pooling system at Quebec as illegal and anti-democratic. As seen earlier, six pilots have refused to join the Corporation. One of them, Captain Roland Barras, was subpoenaed by the Commission. In his testimony, he stated, *inter alia*, that he could not accept having his earnings paid without his consent to a Corporation to which he does not belong and which, against his will, forces him to share its expenses. He feels that this situation is illegal and he reserves his right to claim any money the Corporation retains from his earnings. He added that he had never demanded a complete accounting because in order to enforce his demand he would have to sue the Corporation and, in order to defend itself, the Corporation would incur legal fees that he would have to pay indirectly because these fees would then become a Corporation expense.

On February 12, 1958, the Cornwall Corporation, in a memorandum signed by its legal adviser and addressed to the Pilotage Authority, tried to obtain official recognition as the sole body whose members could pilot in the District. As was to be expected, the request was not granted because recognition would have placed immense powers in the hands of the Corporation, such as the power to determine the number of pilots by refusing to admit newly licensed pilots, or to control licences by the simple process of expulsion.

One member, Pilot George Downey, once tried to withdraw his power of attorney but his Corporation refused. With financial and legal assistance from the Shipping Federation he sued the Corporation but before the case came up for hearing he withdrew his proceedings and abandoned his claim.

The objection of the dissident Montreal river pilots is based more on a matter of principle. They object to what they believe are the excessive powers of the Corporation and its directors, which may lead to abuses. They prefer the association system where the limitations on, and powers of, the directors are defined in the terms of the contract. When the question of the creation of the Corporation was studied, these pilots sought an independent legal opinion. In a letter dated February 20, 1959 (Ex. 872) they were informed that the proposed Corporation and its by-laws did not provide the guarantees that the pilots enjoyed with a deed of association. The legal firm pointed out various extraordinary powers granted to the Board of Directors that they termed "dictatorial" and stated their opinion that these would subordinate all the pilot members to the most absolute, arbitrary control, and would open the door to unnamed abuses that the pilots would have no effective means to prevent.

When legal means are inadequate it is to be feared that illegal methods may be adopted. It is pertinent to note (a) despite the fact Pilot Downey apparently had a sound legal case and was provided with financial and competent legal assistance, he desisted before the case came up for hearing; (b) five of the 21 Quebec pilots who signed the March 12, 1964 petition filed during the following month five identical documents withdrawing their petition; (c) Captain Barras complained of discrimination against the six Quebec dissidents in that they are prevented from attending the meetings where decisions which affect their earnings are taken under the pretext that they are Corporation meetings, although the Association By-law provides that the Corporation's decisions bind the Association; (d) anonymous telephone calls are received.

The various objections raised by the dissidents, and by the other pilots, to the corporation system are studied at length in the sections of the report dealing with these Districts. They can be summed up by saying that they are based more on principle than on fact. At this stage the only important point to note is the atmosphere which has been created mostly, if not wholly, by the failure on the part of the Pilotage Authorities to impose pooling in these Districts combined with the pilots' lack of adequate legal means to resolve the problem.

The corporation system plays a secondary rôle which has a certain importance, i.e., it provides a legal representation for the group where common professional interests are involved, and it also provides the means to promote group activities. In this respect a corporation holds a marked advantage over a pilots' committee whose only power is to represent the pilots vis-à-vis the Pilotage Authority.

The success of the British Columbia pilots under their Pilots' Committee was achieved only because the Committee's own expenses were minimal and its activities were limited to matter that were generally not contentious as far

as the pilots were concerned. Under these circumstances unanimity was easily achieved. On February 22, 1963, a charter was issued under Part II of the Canada Corporation Act creating *The Corporation of the British Columbia Coast Pilots* (Ex. 93 and 1166). The charter lists the same aims as appear in the latest charter previously granted—the Quebec District Pilots' Corporation—including the power “to regulate the practice of pilotage”, to control apprenticeship and to organize and operate the pooling of the pilots' earnings. These powers are rendered ineffective for the time being by the proviso that limits these powers since the District By-law provides for despatching and pooling to be effected by the Pilotage Authority and for pilots to be recruited by a different method than apprenticeship.

All British Columbia pilots have joined the Corporation. It finances its operations in the normal way, i.e., through membership dues.

C. FEDERATION OF THE ST. LAWRENCE PILOTS

Because the St. Lawrence Districts were contiguous, formed part of a single, continuous pilotage service, faced common problems and had common interests, they were led to follow the example of the Pilotage Authority and of the shipping interests by creating a central organization. In 1903 the Shipping Federation of Canada was incorporated by a special Act of Parliament (3 Ed. VII c. 190), and the Dominion Marine Association by letters patent dated January 13, 1961 (Ex. 1136). In 1959 the Department of Transport as adviser to the Pilotage Authority of these Districts created the post of Regional Superintendent as their representative with jurisdiction over the three St. Lawrence Districts (Ex. 542).

Letters patent issued November 5, 1959 created the *Federation of the St. Lawrence River Pilots* (Ex. 751), which all the pilots organizations of the St. Lawrence Districts have since joined. It is not a true federation but an independent corporation operated by members recruited from local organizations. Its decisions have no binding effect on the local organizations unless approved by them. Before the Federation existed the pilots had relied for group action either on the *Canadian Merchant Service Guild* grouping Canadian Masters and mates and pilots and to which most pilots belonged, and still belong, as individuals and not as groups, or on temporary and *ad hoc* joint committees similar to the one that was formed to oppose Bill S-3 in 1959. The pilots' strike of April 1962 was decided at the local Corporation level when negotiations by the Federation failed to bring the expected results, but the negotiations to settle the strike affecting the three Districts were carried out by the Federation. Here again the creation of such a federation answered a real need.

COMMENTS

It is considered that the need for legal recognition of a controlled pilotage service—wherever the service is justified by public interest or safety of navigation—has been fully demonstrated by events. It is agreed that in certain localities pilots should continue to be independent contractors competing for clients but, in general, future legislation should provide for full control of the pilotage service.

It is imperative to correct the prejudicial situation in which most pilots now find themselves due to the ambiguity of their status, i.e. whether they are self-employed or employees.

The full complement of pilots in a given District, or any clearly defined group of pilots recognized by the Pilotage Authority in a District should become a corporate body under pilotage legislation. The Act should enumerate and define the various powers to be enjoyed by these *sui generis* corporations: some of general character that all such corporations would automatically possess and some special powers that such corporations would enjoy only if and when granted by the Authority empowered to define the organizational structure of Districts, when such powers are needed to meet a particular requirement related to the type of organization under which a District, or part of a District is operating.

The Act should also provide an adequate system of control over the corporation's activities so that any irregularities, abuses or discrimination could be effectively prevented or corrected. It was mostly the abuses of its Board of Directors that brought about the demise of the 1860 Pilots' Corporation and these abuses arose largely because the Pilotage Authority lacked proper power to control the Corporation's activities. A secondary cause was the failure to exercise the limited supervisory and control powers the Authority possessed.

Chapter 5

PILOTAGE DISTRICT FINANCIALLY INDEPENDENT AND SELF-SUPPORTING

Pursuant to the Canada Shipping Act, Pilotage Authorities are self-supporting and hence are empowered to raise the money required to meet their operational expenses. There is no provision in the Canada Shipping Act which enables Pilotage Authorities to obtain money from outside sources, e.g., subsidies from the Crown.

PILOTAGE MONEY IS PUBLIC MONEY

Since the Pilotage Authorities are officers of the Crown (vide C. 8, pp. 240-241, all money they receive in their official capacity becomes public money which subsec. 2(m) of the Financial Administration Act defines as follows:

“(m) ‘public money’ means . . . and includes . . .

(iv) money paid to Canada for a special purpose”.

This last expression is also defined in the Financial Administration Act as follows:

“(k) ‘money paid to Canada for a special purpose’ includes all money that is paid to a public officer under or pursuant to a statute, trust, treaty, undertaking, or contract, and is to be disbursed for a purpose specified in or pursuant to such statute, trust, treaty, undertaking or contract.”

The Canada Shipping Act defines how most of this money is to be disposed of, including “for a special purpose”.

In the absence of any provision in the Act concerned, this money, when collected, must be deposited to the credit of the Receiver General (subsec. 16(1) Financial Administration Act). The Pilotage Authorities do not follow this procedure but deposit pilotage money in their own name (*see Ancillary Powers of Pilotage Authorities*, C. 8, pp. 315 and ff.).

As seen later, except for funds that belong to third parties which ought to be handled as provided for in the Financial Administration Act, all money paid to a Pilotage Authority is public money which the Pilotage Authority, as an officer and agent of the Crown, can only dispose of as directed by legislation. The Pilotage Authorities, *per se*, have no assets or general fund which they can retain or dispose of at will. They are not profit-making concerns. All their funds and assets are marked for special purposes and can not be held or used in any other manner. Any payment or any disposal of this money by a Pilotage Authority for any purpose other than specified in the Act for a given type of receipt or even if spent for an approved purpose but without complying with the conditions and procedures imposed by the Act is illegal. Any such disposition by the Pilotage Authority would amount to misappropriation of public funds and would render the members of the Pilotage Authority concerned personally liable for reimbursement and also liable to penal prosecution under Part IX of the Financial Administration Act.

TYPES OF FUNDS

Part VI of the Canada Shipping Act refers to only one type of fund: the pilot fund (erroneously referred to as "Pilotage fund" in the marginal note to sec. 374), and deals independently with every other category of revenue collected by a Pilotage Authority. For study purposes, all revenues and monies which come into the hands of the Pilotage Authority of the District may be grouped in three classes: (a) the pilot fund, (b) the Pilotage Authority's general expense fund and (c) money belonging to the Consolidated Revenue Fund of Canada or to third parties.

The term "pilotage fund" which is currently used is a creation of the By-laws where it means the aggregate amount of all the money received by or on behalf of a Pilotage Authority, apart from the trust fund which is the pilot fund. It has no further meaning or implication because the application to be made of the various items that compose it varies with each type of revenue. It is, in fact, merely the name given to the bank account in which a Pilotage Authority deposits the money it receives.

PILOT FUND

The "pilot fund" (also referred to in the By-laws as the "pension fund" when it consists of a superannuation scheme) is defined in subsec. 2(68) C.S.A. where it is called "pilots' fund".¹ A Pilotage Authority may establish a pilot fund by by-law made pursuant to subsec. 319(1) 1934 C.S.A. (which

¹ According to the rules of interpretation, the use of a different expression should indicate that a different meaning was intended. This can not be the case here because "pilots' fund" is not found anywhere else; it is obviously another error of drafting which occurred with the 1934 version of the Canada Shipping Act; up to then, the definition referred to the expression "pilot fund" (vide subsec. 409(1), 1927 C.S.A.)

is still applicable) and sec. 735, 1952 C.S.A., as a trust fund that the Authority administers and uses according to secs. 358 and 375, or the regulations it has made pursuant to subsec. 329(m) for that purpose, "for the relief of retired or superannuated or infirm licensed pilots, or their wives, widows and children".

The pilot fund does not automatically exist. It is the prerogative of the Pilotage Authority to decide whether to create a fund or not (except for the District of Quebec where it exists, pursuant to the Trinity House Act of 1805). When such a fund is created, the Act stipulates what money shall form part of it:

- (a) the pilots' personal contributions proportional to their earnings. The percentage must be mutually agreed to by the Pilotage Authority and the pilots; otherwise it is to be fixed by the Minister of Transport acting as arbitrator. In no instance shall it be less than 5 per cent of the pilots' earnings (subsec. 319 (l) 1934 C.S.A.);
- (b) in the compulsory payment Districts, the residue of the pilotage dues collected from vessels requiring a pilot which failed to comply with secs. 348 and 349, after deduction of both the collection expenses and the pilotage dues to which individual pilots are entitled as a result of the implied pilotage contract (subsec. 350(2) and sec. 351, vide C. 7, pp. 230-232;
- (c) the money, in the nature of a fine, collected from non-exempt ships requiring a pilot on inward voyages for their failure to comply with the procedure set out in sec. 349 (subsec. 350(1), vide C. 6, pp. 200-201;
- (d) the fines (not penalties, vide pp. 101-102) paid by licensed pilots and apprentices for offences against the provisions of Part VI or for a breach of the By-laws, rules and regulations made under Part VI (subsec. 708(1)).

Sec. 375 provides for the expenditure of the money in the pilot fund, that is:

- (a) as a first charge the payment of all expenses incurred in the administration of the fund;
- (b) the payment of pension benefits, or other relief for incapacitated or retired pilots, their widows and children as the Authority may decide (sec. 358) or as provided for in regulations, if any (sec. 329(m));
- (c) the payment of allowances that the Pilotage Authority may decide to make to a pilot whose licence was cancelled pursuant to subsec. 568(2) by a Court of Formal Investigation as a result of a marine

casualty (vide C. 9, pp. 409 and ff.). In each case it is left to the discretion of the Pilotage Authority to fix the amount of such allowances.

The nature and financial position of the existing pilot funds are studied later in chapter 10.

PILOTAGE AUTHORITY'S EXPENSE FUND

The second type—the Pilotage Authority's expense fund—is the aggregate sum of the money received by the Pilotage Authority from which it is authorized to pay the "necessary expenses of conducting the pilotage business in the district" (sec. 328). The meaning and scope of this expression are studied under Pilotage Authority—Ancillary Powers (C. 8, pp. 316 and ff.). Hereafter, the said expenses are called operating expenses. This fund is composed of two types of receipt:

1. The revenue that can be spent for District operating expenses only:
 - (a) whether or not a pilot fund exists, the dues collected as a result of the compulsory payment system (except as mentioned in (d) below), i.e. for outward voyages, transit voyages and movages (secs. 328, 345 and 357);
 - (b) fees for licences (excluding those for renewal of licences of pilots over 65 (sec. 339)), i.e., licences issued to pilots and apprentices pursuant to subsec. 329(e);
 - (c) in the absence of a pilot fund in the District, the fines (not penalties) paid by licensed pilots and apprentices for offences under Part VI (subsec. 708(2));
 - (d) in the absence of a pilot fund the dues collected as a result of the compulsory payment system from ships which required a pilot on their inward voyage but did not comply with secs. 348 and 349 when no pilotage contract, real or implied, was undertaken (secs. 328 and 348 to 351 inclusive). However it could be argued that they properly should accrue to the Consolidated Revenue Fund of Canada because in that eventuality no specific disposal application is made in the Act, sec. 351 being an exception to sec. 328;
 - (e) when pilotage dues for services rendered are not payable to the Pilotage Authority, individual pilot's contributions pro-rated to their earnings to cover any District operating expenses left unpaid after all the funds derived from the foregoing items have been expended. Since Pilotage Authorities are not authorized to accumulate any funds (except the pilot fund), the individual pilots may not be assessed more than is needed to cover any actual operational deficit.

2. Revenue received by the Pilotage Authority for collection purposes but belonging to others, i.e., pilotage dues for services rendered, if it is specified by by-law that they are payable to the Pilotage Authority (subsec. 329(h)). These pilotage dues are the earnings of the pilots and the licensed pilot vessels. When collected they must be paid by the Pilotage Authority to each pilot or pilot vessel which earned them, less the pilot's compulsory contribution to the pilot fund, if one exists, and in all cases less the *pro rata* share of the payment of the balance of District expenses.

OTHER MONEY

A third item of revenue is non-public money, and public money for which no special disposition is laid down in the Canada Shipping Act.

Pilotage Authorities must pay to those persons to whom it belongs any non-public money collected, including money received by error, the surplus resulting from the over-payment of dues, any dues paid under protest if subsequently they are found not payable, pilots' indemnities for overcarriage (sec. 359) or quarantine detention (sec. 360), pilotage dues which, according to the By-laws, are payable directly to those who performed the services.

Other items of public money which must form part of the Consolidated Revenue Fund of Canada because no special application or purpose is indicated in the Act include:

- (a) any fine imposed on a pilot by a Court of Formal Investigation (subsec. 568(2)). Subsec. 708(1) does not apply because the fine is not imposed under Part VI;
- (b) the penalty imposed in the disciplinary regulations passed under subsec. 329(g) except, when applicable, the half that belongs to the person who sued with the Crown for its recovery. Prior to 1934 there was no distinction between fine and penalty (re meaning of these terms, vide C. 9, pp. 380-381); when the distinction was made in 1934, different methods of recovery were provided for each (see sec. 683 on the recovery of fines and sec. 709 on the recovery of penalties). On the same occasion the section that provided for the application of penalties to the pilot fund (sec. 543, 1927 C.S.A.) was modified, *inter alia*, by deleting the word "penalty" and replacing it by the word "fine" (sec. 700, 1934 C.S.A.). This has remained unchanged ever since (sec. 708); no further provision has been made for the disposal of penalties. It must be concluded that Parliament intended that only fines should be disposed of in this manner and that all penalties should be payable to the Consolidated Revenue Fund of Canada. Because

there seems to be no logical justification for such a distinction, it appears that it is due to an oversight when the amendments were drafted;

- (c) the licence renewal fees covered in sec. 339, that is, of pilots over 65 years of age. In Districts where the Minister is the Pilotage Authority, it is specifically provided that these renewal fees must form part of the Consolidated Revenue Fund of Canada (subsec. 339(2)). In other Districts, subsec. 339(1) indicates that renewal fees should be applied as "prescribed by this Part" but the Act contains no other provision on the matter with the result that these fees must also be paid into the Consolidated Revenue Fund. Here again the only apparent reason is an oversight in drafting. Formerly they were applied for the same purposes as the fees payable by Masters and Mates for pilotage certificates (secs. 35 and 71, 1886 Pilotage Act);
- (d) the fees payable by Masters and Mates for pilotage certificates (subsec. 329(e)). It is no longer stated in the Act how these fees should be applied. A provision to this effect which was contained in former legislation was not abolished until 1934. Sec. 471 of the 1927 C.S.A., for instance, authorized the Pilotage Authority to apply these fees "to the payment of expenses of examinations or any other general expenses connected with pilotage incurred by such authority, or paid into the pilot funds of the District, if any, or disposed of for the benefit of the pilots licensed by such Authority in such other way as the Pilotage Authority shall deem advisable". This again would appear to be the result of poor drafting in 1934;
- (e) when no pilot fund exists money derived from fines (less collection expenses) paid by non-exempt ships which required a pilot on their inward voyage but did not comply with the procedure set out in sec. 349 (subsec. 350(1)). This money is payable to the Pilotage Authority in addition to the pilotage dues in Districts where payment is compulsory. Because it is not identified in subsec. 350(1) with pilotage dues (as are other dues in secs. 348 and 349) it can not be considered as such;
- (f) the Pilotage Authority has nothing to do with the fines imposed on any person other than a licensed pilot or on licensed apprentices, because these fines never come into the hands of the Pilotage Authority, except in the case when the Authority was the plaintiff and, pursuant to sec. 707, the trial judge directed that the fines be applied toward the payment of the court costs.

MINIMAL IMPORTANCE OF REVENUES OTHER THAN PILOTAGE DUES

Aside from pilotage dues, other items of revenue, if any, amount to very little.

- (a) Licence fees yearly in a given District are small. If there are a large number of pilots and the licences are permanent, few fees are collected annually. Furthermore, the fees are minimal: generally \$5 or \$10.
- (b) At present no fees are received for pilotage certificates issued to Masters and Mates, because, as will be seen later (C. 8, pp. 305-308), No Pilotage Authority can exercise this licensing power for lack of appropriate regulations.
- (c) Fines for offences under Part VI are imposed on pilots in large Districts only, and, as far as it was possible to ascertain, no fines were ever imposed on apprentices. Even in the large Districts, the aggregate is very small in any given year. For instance, in the Quebec Pilotage District, in the eleven years from 1955 to 1965 inclusive, fines totalled only \$805. In 1962, the total of \$145 amounted to only .01 per cent of the gross earnings of the District.
- (d) No penalty is provided in any of the current By-laws and, therefore, none is recovered.
- (e) No renewal fees for licences of pilots over 65 years of age are provided in any of the existing By-laws.
- (f) At present there can be no dues resulting from the compulsory payment system and belonging to pilots pursuant to subsecs. 350(2) and 351(1)(b), nor any quasi-fines (subsec. 350(1) vide C. 7, p. 201), because two of the prerequisite conditions no longer exist; first, there is no prescribed signal which an unexempted vessel requiring a pilot may display (C. 3, pp. 60-61); second, the pilots no longer offer their services as required in the Act by answering a ship's request personally. Therefore, the presumed contract that is created by the law when there is such a demand and such an offer can not take place and none of the pilots, either individually or as a group, have any legal claim to any part of the dues collected from ships that did not take a pilot.

It may be wondered why there are two ways of applying dues which are collected as a consequence of the compulsory payment system, i.e., they form part of the Pilotage Authority's expense fund except when they become liable under secs. 348 and 349, in which event they are paid into the "pilot fund" if no pilot can establish an implied contract. The reason appears to be that it was considered desirable to place the Pilotage Authority in an unbiased position, observing that sec.351 makes it the judge wheher an implied

contract exists and hence a negative decision would result in a benefit for its own expense account. It follows that if no pilot fund exists any undistributed dues collected under these sections should be paid into the Consolidated Revenue Fund of Canada.

ILLEGAL APPLICATION OF MONIES THROUGH BY-LAWS

As indicated earlier, Parliament has dealt fully with the application of the various kinds of money collected or received by the Pilotage Authority and in the law, as it exists today, no discretion whatsoever (except for pilot vessel earnings) is left to the Pilotage Authority, either through regulation-making or in the course of its administration. Therefore, every By-law provision that deals with the handling and the disposition of the various items of pilotage receipts (except for pilot vessel earnings, vide C. 8, pp. 280 and ff.) is illegal as *ultra vires*. If these regulations merely reproduce the provisions of the Act, they are superfluous; if they vary the statutory application, they are *ultra vires*. By-laws should not be used as a means of issuing bookkeeping instructions to the Secretary-Treasurer or the bookkeeper. These are merely administrative instructions that do not form part of the legislation and *a fortiori* must conform to the Act. Therefore, the following By-law provisions, *inter alia*, are illegal:

- (a) the provisions which come into conflict with the Financial Administration Act on the subject of the safekeeping and handling of pilotage money;
- (b) the provisions that deprive a pilot of the dues he has earned personally, namely, the By-law provisions for pooling pilot money, or making the dues the property of the Pilotage Authority, when and where the pilots are on a fixed salary;
- (c) the provisions that modify the applications made by the Act of the various types of dues collected because of the compulsory payment system, such as:
 - (i) subsec. 9(2) of the Cornwall District By-law which extends the application of subsec. 350(2) C.S.A. to all types of voyages, despite the fact that subsec. 350(2) can not be applied as seen earlier (p. 103), and because vessels transit the Cornwall District and hence do not make "inward voyages". In Part VI the presumed contract for the inward voyage (subsec. 350(2)) is an exception to the rule governing actual contracts and, hence must be given a restricted interpretation. The situation for which secs. 348 to 351 inclusive were conceived does not exist in the Cornwall District because there is no seaward boarding area through which, as in the early days, pilots are obliged to sail in order not to

delay incoming ships. Therefore, in the Cornwall District there can be no question of a presumed contract and any dues collected from non-exempt vessels which do not employ pilots must be disposed of pursuant to sec. 328 toward the payment of the operational expenses of the District.

- (ii) subsec. 9(2) of the Quebec District By-law, which provides that all such pilotage dues, without distinction, belong to the "Quebec Pilots' Pension Fund". Only dues owing in respect of inward voyages, provided the conditions of secs. 348 and 349 C.S.A. are met, can form part of a pilot fund (subsec. 351(2)). In the Quebec District, as elsewhere in Canada, secs. 348 to 351 inclusive are not applicable at present. Furthermore, sec. 328 does not apply to the Quebec District (C. 5, pp. 111 and ff.). Hence, because there is no specific application in the Act and because there can be no presumed contract in the District under existing arrangements, all dues owed because of the compulsory payment clause belong to the Consolidated Revenue Fund.
- (iii) sec. 10 of the British Columbia By-law, sec. 10 of the New Westminster By-law, etc., which make all pilotage dues part of the pool to be shared among the pilots whether they were earned by pilots or were owing on account of the compulsory payment system. Because the Sydney District By-law contained a similar provision (sec. 9) the Sydney pilots, before they became employees of the Crown, derived illegally each year a sizeable part of their personal earnings from dues collected from the C.N.R. ferry vessels which did not use pilots and against which the pilots had no claim. In 1965, 86 per cent of the revenues of Port aux Basques were derived from pilotage dues paid by the same ferry vessels which neither employed nor needed the Port aux Basques pilot (vide Appendix IX, paras. 22 to 26).
- (d) the provisions which make part of the pilotage dues payable to non-licencees, i.e., the Receiver General of Canada, when the pilot vessel service is provided by the Department of Transport or when ships have to be provided with radiotelephone equipment, also furnished by the Department (Quebec District By-law, subsec. 9(3)); or by the National Harbours Board when one of its tugs is used as a pilot vessel at Churchill (Schedule 2 Churchill By-law);
- (e) the provisions that the indemnity payable pursuant to secs. 359 and 360, to pilots who are overcarried or detained in quarantine shall be made part of the pool to be shared by all the pilots, i.e., subsec.

- 12(1) of the British Columbia District By-law, subsec. 9(7) of the Halifax District By-law, subsec. 9(7) of the Sydney District By-law and subsec. 9(7) of the Saint John, N.B., District By-law;
- (f) provisions that create new items of revenue not provided for in the Act, such as fixing an examination fee. A Pilotage Authority can not debit anyone unless there is specific authority in the Act, such as exists for the licence and certificate fees. The examination of candidates must be free of charge; for this reason subsec. 17(2) of the British Columbia By-law, subsec. 11(5) of the Bras d'Or Lakes By-law, subsec. 14(2) of the New Westminster By-law, are *ultra vires*;
 - (g) the various provisions for the payment of a fixed remuneration to probationary pilots, e.g. subsec. 19(2)(b) of the New Westminster By-law, *a fortiori* when the amount is left to the discretion of the Pilotage Authority as in subsec. 12(2) of the Bathurst By-law, subsec. 17(3) of the British Columbia By-law, etc.;
 - (h) the provisions for leave of absence with pay and half pay that are found in all By-laws in Districts where the Pilotage Authority operates a pooling system;
 - (i) the provisions which authorize the Pilotage Authority to accumulate a reserve fund, such as subsec. 9(3) of the Humber Arm District and subsec. 8(3) of the Port aux Basques District.

PILOTAGE AUTHORITY'S EXPENSE FUND

Therefore, pursuant to the provisions of Part VI, the Pilotage Authority is provided with revenue of its own to meet its necessary operating expenses and it is only in the event that an unpaid balance remains after this revenue has been exhausted that the Pilotage Authority has the power to raise the required money from the pilots and the licensed pilot vessels, *pro rata* to their earnings. Expenses should be paid as they are incurred. If the Pilotage Authority's own source of revenue produces a surplus the Act is silent about its disposal. It can not be paid to the pilots, either directly or indirectly, because they are entitled only to what they have earned either by performing services or through a presumed contract. It is considered that any such surplus should be retained by the Pilotage Authority to meet future operating expenses, because the fact that some of this money is not spent does not alter its nature and it remains public money for a special purpose, that is, to pay operating expenses. Eventually, if and when the Pilotage District is abolished, any unexpended balance accrues to the Consolidated Revenue Fund of Canada.

DISTRICT OPERATING EXPENSES AND PILOTS' OWN EXPENSES

The small number of statutory provisions covering the financial administration of Pilotage Districts is explained by the fact that under the scheme of Part VI the *operating expenses of any Pilotage Authority* can not be very large. To understand the situation fully, it is essential to ascertain what can be legally considered the "necessary expenses of conducting the pilotage business of the district". Here a distinction must be made between the operating costs of the Pilotage Authority and the operating costs of the pilots and in addition the term 'pilotage dues' as opposed to 'pilots' earnings', must be defined.

The Pilotage Authority's operating expenses are those that are necessary for it to discharge its responsibilities. As will be seen later, its main function is to issue licences. *Inter alia*, it has no power to intervene in the actual provision of the service, which is solely the statutory and contractual responsibility of the pilots themselves. Therefore, all costs incurred in providing pilotage for ships are the *pilots' professional operating expenses*. The Pilotage Authority's expenses are incurred particularly in making regulations and incidentally to issuing licences, i.e., the cost of examining candidates for pilotage, investigating whether a pilot is still qualified or fit to hold his licence, and prosecuting pilots for offences or breaches of By-laws. These expenses also include the costs incurred during the exercise of the Authority's auxiliary powers, e.g. the cost of collecting dues and of maintaining an office and the clerical staff required to perform its functions.

When the provisions of sec. 328 were included in the legislation for the first time, in 1875, the only possible type of Pilotage Authority was a Board, either a corporate body as in the four Districts of Quebec, Montreal, Saint John and Halifax, or Government appointees as elsewhere. The services of a Secretary-Treasurer were required to implement the Board's decisions. His remuneration, which was the main item of expenditure, was specifically dealt with in the Act, no doubt to prevent any criticism or interference by the pilots, while only a general provision was made to cover all the other items.

In the New Westminster District in 1963, for instance, excluding the Secretary-Treasurer's remuneration and the items of expenditure paid for the benefit of the pilots themselves—travelling expenses, premium for health and travel insurance, etc.—the operating expenses of the District amounted to less than one per cent (0.798%) of the District gross revenues. The aggregate operating costs for that year including the Secretary's salary of \$6,600. amounted to 1.28 per cent.

PILOTAGE DUES AND PILOTS' EARNINGS

The term "*pilotage dues*" is defined in subsec. 2(70) as "the remuneration payable in respect of pilotage". Since only a pilot can perform pilotage, the dues are, in fact, the remuneration of the pilot who performed the service; they are the pecuniary consideration of the pilotage contract.

When pilotage legislation was first introduced the term was identified with the remuneration of the pilot (subsec. 18(8), 1873 Pilotage Act). It was amended to read as in the present definition at the time of the 1886 revision and consolidation of the Act. However the remaining provisions were not changed. In fact the organizational scheme was not altered, and only one ambiguity was corrected. The pilotage dues remained, and still are, the pecuniary consideration of the pilotage contract. For the ship the dues are the aggregate amount she has to pay for pilotage services; for the pilot they are the gross amount he earned through the pilotage contract, out of which he must pay his own operating expenses. Pilotage dues for services rendered always belong to the pilot who performed the services, despite the fact that in some exceptional circumstances, the Act, in order to reduce the pilot's own costs, has authorized the Pilotage Authority to provide by by-law for a limited compulsory pooling of the pilots' own earnings (pilot companies, subsec. 329(c)) and also for sharing the dues with the owners of licensed pilot vessels used by pilots (subsec. 329(b)).

That pilotage dues belong to the pilot who performed the services for which they are the price is an essential feature of the organizational plan of Part VI. A contrary view would be a direct contradiction of a number of provisions of the Act, which would then become meaningless, *inter alia*:

- (a) Sec. 352 poses the principle that once a ship has voluntarily hired a pilot to act as such, she cannot be exempted "from the liability to pay pilotage dues earned" by the licensed pilot so hired. Whether the payment is, or is not, made compulsory in the District concerned has no bearing.
- (b) Sec. 353 deals with the special case where, on account of unavoidable circumstances, a pilot cannot board a ship, and in the circumstances does the best that can be done, i.e., he guides the ship by leading the way in another vessel. The section provides that the pilot "so leading . . . is entitled to the full pilotage dues for the distance run, as if he had actually been on board and piloted such ship".
- (c) The expression "the same sum as would have been payable to such licensed pilot if his services had been accepted" found in sec. 348 and subsec. 350(2) is meaningless if the dues do not belong to him and are not the price of his services.
- (d) Only pilots or Pilotage Authorities (not the owners of pilot vessels) have a legal claim against a ship for pilotage dues (sec. 343).

The regulation-making power of the Pilotage Authority with respect to pilotage dues clearly indicates what made it necessary to distinguish between pilotage dues and a *pilot's own earnings*:

- (a) The two terms are used separately in subsec. 329(h).

- (b) Pilotage dues may also include earnings by pilot vessels when this service is not provided by the pilot himself. The Pilotage Authority has the power to define by by-law what part of the dues fixed in the tariff is distributed to the pilot vessels it has licensed and what part to the pilots, as their respective "earnings" (subsec. 329(b)).
- (c) The pilot fund or pension fund contribution is a charge against the pilot's own earnings and not against his pilotage dues (subsec. 329(l)).

As is further demonstrated later (C. 6, pp. 182-183 and ff., and C. 8 pp. 276 and ff.), the share of the dues payable to the pilot vessel owner is not an operating expense of the Pilotage Authority (any more than is the pilot's contribution to the pilot fund) but an expense of the pilot himself, in that the responsibility for providing transportation to and from a vessel is an obligation of the pilot resulting from the pilotage contract he has made. He must provide the means to make himself available. The situation does not change when, instead of providing his own means of transportation himself by owning and operating a pilot vessel at his own expense, he privately hires the services of a boat owner; or when the pilots group themselves in companies to operate their pilot vessels. The transportation charge always remains one of the pilot's own operating costs and is not chargeable to the Pilotage Authority under existing legislation.

PILOTAGE AUTHORITY'S EXPENSES BORNE BY SHIPPING

In conformity with the principle that the cost of a service should be borne by the person to whom it is provided, the expenses that the Pilotage Authority has to incur in the discharge of its licensing and other related responsibilities must be borne by the ships which benefit from the licensing service. The fact that some of these expenses are paid out of pilotage dues does not alter the situation because this is merely a simple and indirect method of collection. The aggregate amount of a Pilotage Authority's expenses should be fairly constant from year to year and the main changes that occur are the direct result of Pilotage Authorities' decisions, e.g., raising the secretary-treasurer's salary, increasing the clerical staff or incurring higher office rental charges. Although the Pilotage Authority's own sources of revenue are very limited, its anticipated expenses vary little from year to year and the total is a predictable item that can be taken into account when the schedule of pilotage dues is drawn up. The aim must be to provide the pilots with adequate remuneration after deducting their operating expenses, their contributions to the pilot or pension fund and their share of District expenses.

PROCEDURAL REQUIREMENT

Parliament has ensured that the Pilotage Authority is sufficiently independent of the pilots, to whom the dues belong, by granting it power under sec. 328 to pay the unpaid balance of its operating expenses from the dues without obtaining their consent.

As a check against any possible misuse or abuse on the part of the Pilotage Authority, Parliament has established a means of control by subjecting the exercise of this power to the prior authorization of the Governor in Council.

Approval to take this action can not be obtained by by-law because when the Pilotage Authority makes a by-law it is exercising a delegated power of legislation which is strictly limited by the terms of the delegation. None of the sections of Part VI which give the Pilotage Authority its regulation-making powers provides that the Pilotage Authority can by regulation empower itself to pay its operating expenses. No by-law legislation is indicated because the point is fully covered in sec. 328. The confirmation of a by-law by the Governor in Council renders its provisions valid only if they are *intra vires* of the regulation-making powers of the originating Authority.

ULTRA VIRES BY-LAW AUTHORIZATIONS

Therefore, all the provisions contained in Pilotage District By-laws which authorize the Pilotage Authority to pay District operating expenses are *ultra vires* including:

- (a) subsec. 3(3) of the New Westminster District General By-law which provides that the "Secretary shall receive a salary at a rate determined by the Authority";
- (b) subsec. 10(2)(a) of the same By-law which provides that the Secretary shall pay out of the pilotage fund each month "the salary of the Secretary and such other expenses incurred in conducting the business of the District as are approved by the Authority";
- (c) subsec. 8(2) of the Bras d'Or Lakes Pilotage District General By-law which provides that the "Superintendent shall pay out of the Pilotage Fund each month the current expenses of the District";
- (d) the provisions to the same effect contained in the small commission District By-laws, such as Bathurst Pilotage District, subsec. 8(2)(a), Botwood Pilotage District, subsec. 8(4), Buctouche Pilotage District, subsec. 8(2)(a), Caraquet Pilotage District, subsec. 8(2)(a), Humber Arm Pilotage District, subsec. 8(2)(a), Miramichi Pilotage District, subsec. 9(2)(a), Pictou Pilotage District, subsec. 8(2)(a), Port aux Basques Pilotage District,

subsec. 8(2)(a), Restigouche River Pilotage District, subsec. 8(2)(a), Richibucto Pilotage District, subsec. 8(2)(a), Shediac Pilotage District, subsec. 8(2)(a).

The sanction required by sec. 328 is a specific sanction for each item of expense and, therefore, can not be granted at large. Recurring expenses, such as salaries, rent, etc., may be approved in advance provided the amount is already determined, e.g. sec. 328 authorizes the appointment and the remuneration of a "secretary and treasurer". The salary of the secretary-treasurer is established by mutual agreement between the Pilotage Authority and the person who is to be hired as such, after which authorization is obtained from the Governor in Council for the Pilotage Authority to incur the liability, i.e., to enter into a contract of hiring and to pay the salary as long as the contract is in force, namely, as long as the secretary-treasurer remains in the employment of the Pilotage Authority or until the Governor in Council permits the Authority to vary the remuneration. For items that can not be determined in advance, authorization must be obtained each time. For small items, the amount of which may vary but which are of a recurring nature, it is considered that it would be proper to prepare a budget or estimate as is done by government departments to obtain the funds they require (vide C. 8, p. 316).

EXCEPTION FOR QUEBEC DISTRICT

Sec. 328 makes an exception of the Quebec District Pilotage Authority and deprives it of permission to pay any of its own operating expenses. As already pointed out this exclusion has the effect, *inter alia*, of making all the money that normally belongs to the Pilotage Authority's expense fund payable to the Consolidated Revenue Fund. This exception is now groundless and should be deleted because the situation that formerly justified it has long since disappeared. This exception was included in the text of the 1875 amendment because, at that time, the Quebec Pilotage Authority (Quebec Trinity House) had other sources of income and because its duties as Pilotage Authority were only part of its responsibilities. Furthermore, the operational expenses of the Authority were very small as a result of the special system provided by the Act of incorporation of the Quebec pilots in 1860: all the dues belonged to the Pilots' Corporation and were payable to it, and the costs of collection were borne by the Corporation. There are many reported cases of the Pilots' Corporation acting as plaintiff to collect pilotage dues. The Quebec Pilots' Corporation has since been deprived of these powers and when the Act was amended in 1934 the Quebec District organization was made to conform with the organization of other Districts. Hence, there remains no reason to retain this limitation on the powers of the Quebec Pilotage Authority. It was intended to delete the exception but this was not done because the Quebec pilots protested, claiming that, pursuant to the

1905 private agreement between themselves and the Minister, all the costs of operating the District and of providing and operating the service were to be borne by the Crown (vide Quebec District).

SEC. 328, C.S.A., NOT FOLLOWED

In practice, the directions contained in sec. 328 are not followed: Pilotage Authority's expenses are being paid out of the pilotage fund without obtaining the sanction of the Governor in Council; *ultra vires* expenses are being incurred and paid out of the pilotage fund; in those Districts, where the Minister is the Pilotage Authority, the cost of operating the service is not charged to the users but paid directly or indirectly by the Crown.

The imperative provision of sec. 328 is almost completely disregarded, with the exception of the belated approval obtained for the appointment of the New Westminster Secretary-Treasurer. The Commission has been unable to discover when a Pilotage Authority last sought the approval of the Governor in Council before paying for an item of its operating costs. As seen above, blanket authority was purported to be given in by-laws (which were *ultra vires*) to pay District expenses at the discretion of the Pilotage Authorities concerned without further approval. Despite the clear and imperative provision of sec. 328 the approval of the Governor in Council for the appointment of secretary-treasurers and for their remuneration is not being sought and it is only in the New Westminster District that this error was rectified recently. The present secretary-treasurer had been appointed by the Pilotage Authority in 1952 and his salary was paid out of the pilotage fund for 10 years without the Governor in Council's authorization; it was only in 1962 that this approval was belatedly obtained. It also appears that neither the appointment nor the remuneration of his predecessor in office had ever been authorized. Again, in New Westminster, for many years the members of the Pilotage Authority voted and paid themselves a remuneration out of the pilotage funds. This was not permissible even if the approval of the Governor in Council had been obtained because there is no provision in the Act whereby members of any Pilotage Authority can receive remuneration of any sort. The practice was discontinued, not because the illegality was realized, but as a good will gesture to increase the pilots' remuneration without increasing the tariff. The New Westminster Pilotage Authority regularly made its annual report to the Minister of Transport as required by sec. 332 and the questions of the lack of approval by the Governor in Council and of the illegality of the Commissioners' remuneration were never raised by D.O.T.

The Department of Transport is acting on the assumption that it is no longer necessary to comply with the provisions of sec. 328 whenever the

payment of District expenses is authorized in a District By-law approved by the Governor in Council. In any event they feel that sec. 328 is not capable of practical application.

"It would, of course, be impracticable to obtain Governor in Council approval of expenses prior to their payment and we have never considered that it is necessary to have an Order-in-Council passed expressly under the provisions of section 328 when the matter is covered in the By-laws." (D.O.T. letter dated Jan. 7, 1965, Ex. 1427 (1)).

By deciding not to insist on compliance with the requirements of sec. 328, by concluding that the section could not be implemented and by letting the various Pilotage Authorities spend pilotage funds without the sanction of the Governor in Council, the Department of Transport substituted its judgment for a decision made by Parliament. This, of course, was illegal. No departmental official—indeed, not even the Government itself—can substitute its opinion in a matter of legislation for a decision of Parliament. When difficulties in application occur, it is the responsibility of the department responsible for implementing the Act (in the present case the Department of Transport) to seek a new decision from Parliament in the form of proposed legislation. In the meantime, the imperative provisions of the Act must be enforced as they stand.

The question was not raised for several reasons. First, most of the operating costs of Pilotage Districts are now paid out of Government funds. It has been the practice in Districts where the Minister is the Pilotage Authority (except Bras d'Or Lakes) to have all their expenses paid by the Crown and not to assess the pilots for this purpose. In the other Districts these expenses are kept to a strict minimum.

Furthermore, as will be shown later, most Pilotage Authorities in the large Districts have assumed the power of managing the pilotage service and at times they provide part of the service. This has caused a great increase in District expenses and, at the same time, has decreased the pilots' operating costs. In Districts where the Minister is the Pilotage Authority (except Bras d'Or Lakes) there is no problem because the expenses have all been absorbed by the Crown. In other Districts these expenses were illegally deducted from the pilotage fund but there was no protest from the pilots because they benefited from the group arrangement. Protests were lodged only when and where the Crown became responsible for operating the pilot vessels and took over the ownership of the vessels, without compensating the pilots.

In New Westminster, for instance, for many years until the Department of Transport took over in 1959, the New Westminster Pilotage Authority owned pilot vessels and operated a service which caused a large capital outlay and considerable maintenance and administrative expenses, including the purchase and upkeep of the boats and the purchase of a waterfront property with a wharf. Other transactions followed such as renting part of the land and premises to third parties, renting other waterfront properties

from the Provincial Government, hiring the pilot boat crews, and paying for repairs and insurance. At first, the pilot boats were registered in the name of the Secretary of the Commission and later, on orders from the Department of Transport, in the name of the members of the Pilotage Authority. When the service was taken over by the Department of Transport, the changeover took the form of a simple transfer of the ownership of the pilot boats from the Pilotage Authority to the Department of Transport without any compensation either to the Pilotage Authority or to the pilots. The Department of Transport explained that the boats belonged to the Pilotage Authority because they were bought with the Pilotage Authority's own money, which was public money because it consisted of pilotage dues, and that, pursuant to the existing By-laws, the pilots were entitled only to the net revenue of the District. However, the legal position was entirely different. The Pilotage Authority had no power and no right to undertake to provide part of the pilotage service or to assume part of the contractual responsibility of the pilots by providing their transportation to and from ships. The fact that it did so could not legalize the situation. Indeed, the Pilotage Authority was only acting on behalf of the pilots, for it purchased the pilot boats and paid most of the related expenses with the pilots' own money. The pilots would have had a good claim that they were the real owners of the pilot boats. From the practical point of view, however, this transaction by the Department of Transport was all to the advantage of the pilots in that the Department absorbed the large debt that was still outstanding on the purchase of the boats, and also from that date provided pilot boat service at its own expense, with no charge to the pilots. When it was decided to levy a charge it was passed on to shipping by a corresponding increase in pilotage dues.

The same situation occurred in other Districts, *inter alia*, at Halifax, where it gave rise to a dispute between some temporary pilots and the Crown. The pilot vessel *Camperdown* had been owned and operated by the Halifax Pilotage Authority and, in order to finance its purchase the Pilotage Authority was obliged to obtain financial help from the Crown which lent the necessary money but required an engagement on the part of the pilots. The vessel was duly insured with benefits payable to the creditor, the Crown. When the vessel was lost as a result of a collision, the Crown received the insurance indemnity and some pilots sued the Crown in order to recover their share. At that time the Halifax By-law contained a section to the effect that the pilot boats belonged to the Pilotage Authority, and that the pilots could claim no share in them. The case was heard by the Exchequer Court (1946 Ex. C.R. 1 *Himmelman v the King*). The Court held that (p. 14) "the vessel, fuel and food purchase out of the fund as expenses under 6(a) are not the property of the pilots and they have only a right of user in them". At p. 15, the Court added that the pilots "are not the owners of the money in the Halifax Pilotage Fund and they do not own the chattels

required in the operation of the service and paid for as general expenses. Under their mode of remuneration provided by By-law 6, they were entitled to only the balance left after the payment of expenses out of revenue". It should be pointed out here that the legality of the two sections of the By-law dealing with the ownership of the pilot boat by the Pilotage Authority and the right of the Pilotage Authority to pay pilot boat operational expenses out of the pilotage fund was not challenged; they were taken by the Court as valid and binding upon both parties.

The Court held, however, that the indemnity paid by the insurance company could not belong to the Pilotage Authority because the "pilotage fund", according to sec. 318, 1934 C.S.A. (now 328), was composed only of the pilotage dues and the licence fees, with the result that the indemnity had to be paid to the Consolidated Revenue Fund. This created an awkward situation resulting from the fact that the Pilotage Authority had assumed powers that it did not have, and there was nothing in the Act to cover the situation. The judgment on this point reads as follows:

"While the limitations in Section 318 of the Canada Shipping Act and in By-law 6, do not permit the proceeds to be deposited in the Halifax Pilotage Fund, the proceeds could be placed, in trust or for a special purpose, in the Consolidated Revenue Fund and be paid out under section 22(2) of the Consolidated Revenue and Audit Act, Chapter 31, Statutes of Canada 1931. The proceeds should be treated in the same way as the money in the Halifax Pilotage Fund and out of the combined totals would come the general expenses, including the purchase of a new vessel".

As will be shown later (C. 6, pp. 192 and ff.) the complete pooling of the pilots' earnings as a mode of remunerating the pilots is not permissible under the provisions of Part VI. However, in many Districts the By-law provides for the compulsory pooling of the pilots' earnings and the pool is operated by the Pilotage Authority. Disbursements incurred for the general benefit of the pilots, such as unemployment, health and accident insurance premiums or the expenses of the Pilots' Committee when acting on behalf of all the pilots are entered as District operating expenses, and paid out of the pool. None of these are Pilotage Authority's expenses but are pilots' own expenses and, therefore, do not come under the provisions of sec. 328. To make these payments the Pilotage Authority need not seek the Governor in Council's approval (and if obtained it would be worthless as legal authority to effect the payment) but must have the unanimous consent of all the pilots because, in fact, it is only acting as their agent and doing their bookkeeping and clerical work. As said earlier, the Pilots' Committee has no power to bind the pilots of a District by its decision. This is *a fortiori* true when the question involves the disposal of the pilots' own earnings; the refusal of one pilot would make it impossible and illegal on the part of the Pilotage Authority to make any deductions from his earnings for the purpose of paying any of these expenses. The consent of the pilots cannot be presumed

and any pilot who had not assented to any such group expenditure would have a claim against the Pilotage Authority which made a deduction from his earnings without his consent. However, this practice is being followed at the present time. (Vide, for instance, in Part II of the Report, the analysis of the Pilotage Authority's expenditures in the British Columbia District.)

DIRECT AND INDIRECT SUBSIDIES

The principle that a District should be financially self-supporting extends only to the payment of the Pilotage Authority's own expenses that it can legally incur. The question whether the pilots derive enough from their profession to enable them to make a reasonable living is another matter. The Pilotage Authority is obliged to fix the dues at a level that is a fair charge for vessels to pay for the nature of the pilotage service rendered. The rôle of the Pilotage Authority is merely to ascertain the qualifications of the pilots who offer their services and not to see that such service is provided, if none exists.

Therefore, when the dues are fixed at the highest reasonable rate and the number of pilots can not be reduced without affecting the quality and efficiency of the service, the Pilotage Authority—under the present legislation—cannot be concerned whether the income that the pilots derive is sufficient or not. If the situation becomes such that, through lack of traffic and other circumstances, the profession at a given place does not attract any pilot, this only means that, under the present legislation as provided in Part VI C.S.A., a Pilotage District and a Pilotage Authority can no longer serve any useful purpose and the District should be abolished. This is the case, for instance, in the Churchill District where there is no local pilot available, and where the income that could be derived from pilotage for some 80 odd ships that call during the 10 weeks the port is open would not be sufficient alone to attract the requisite number of qualified mariners. On the other hand, on account of local circumstances, an annual income from pilotage of \$1,000 or even less at Georgetown and Souris, P.E.I., interests the pilots there because they are on location and pilotage is only one of their occupations. Their other occupations allow them to be available for pilotage duties and their income from all sources is sufficient in the aggregate to meet their needs.

However, where a pilotage service is maintained in the public interest the Government has been resorting to an indirect method of attracting competent pilots, i.e., by assuring them of an adequate income. In addition to providing them with other employment (as is done at Churchill), the Government contributes indirect subsidies by assuming most, if not all, of the pilots' own operating expenses. For a study of the income derived from pilotage by the pilots of the various Districts, reference is made to the financial study by McDonald, Currie & Co. (Appendix IX to this Report) especially paras. 34 to 54.

BACKGROUND OF SUBSIDIES

In order to determine whether the plan of organization provided by Part VI is adequate for present day needs, it is necessary to review briefly the events that led to large scale Government intervention in the pilotage field. Prior to Confederation, in conformity with the principle that the intervention of the Crown in pilotage was merely for the convenience of the shipping interests and that the costs incurred should be borne by them, Crown money was never paid, either directly or indirectly, to support pilotage services. The operating costs of the licensing authorities were levied on the pilots' earnings, except in Quebec and Montreal where the duties and responsibilities of the Pilotage Authority were made an additional function of the local Trinity House. Since these Corporations had their own sources of income in the form of light dues and harbour dues which they were authorized to levy on every ship using their facilities, they made no charge for the services they rendered as Pilotage Authority and the pilots received the full amount of the pilotage dues they had earned. On the other hand, the pilots had to bear the full cost of transportation to and from ships. There was no question that they were all independent contractors operating either alone or, at times, sharing the costs of their pilot vessels in partnerships called companies. This was a period of free enterprise when the pilots openly competed for customers.

The first major change in the system was brought about in 1860 when the Quebec pilots succeeded in having the competitive system abolished. The 1860 Act forced them into a compulsory partnership and the individual pilots lost the right to be a party to pilotage contracts which from then on were made by the Corporation. All pilotage dues belonged to the Corporation. The pilots had to serve in turn as directed by the Corporation, subject, however, to the right of the Master to choose any other pilot that was available. Providing transportation to and from ships in the boarding area became a charge against the Corporation. All the small, individual pilot boats were replaced at the Bic boarding area by four large schooners in which all the available pilots lived. The schooners were kept constantly cruising to meet arriving ships. The pilots were paid, on the basis of time available, an equal share of the net revenue of the Corporation, i.e., they still had to pay the full cost of pilotage operations but there was some reduction in expenses because of the joint operations conducted by the Corporation.

At the time of Confederation the Crown did not pay either the Pilotage Authorities' expenses or the operational costs of pilotage. The special type of organization in the Quebec District confirmed the rule that all the costs of providing the service were borne by the pilots.

The 1873 Pilotage Act retained the same principle and when the pilots had to resort to co-ownership or to third parties to provide pilot vessel service, the Pilotage Authority had the power to fix by by-law what part of the pilotage dues was payable to the owners of the licensed pilot vessels and

what part belonged to the pilots. The Pilotage Authorities were not entitled to pay any of the few expenses they had incurred out of the pilotage dues and the only source of money to meet these obligations was the fees for licences and pilotage certificates. However, the 1873 Pilotage Act, by way of an exception for the Pilotage Authorities of Halifax and Saint John, created a dangerous precedent by authorizing the payment from government funds of a sum not exceeding \$800 a year for the remuneration of their secretary-treasurers (secs. 11 and 16, 1873 Pilotage Act).

No doubt Parliament soon realized the implication of this precedent because two years later, in 1875 (30 Vic. c. 28), secs. 11 and 16 of the 1873 Act were repealed and replaced by the provision that is sec. 328 of the present C.S.A., whereby all Pilotage Authorities, except Quebec, were authorized to use licence fees as well as pilotage dues to pay their expenses provided they had the approval of the Governor in Council.

The next change in the basic situation affected the Montreal pilots. As seen later, at the time of Confederation they were free, independent contractors, each paying his own expenses. Since the Montreal Trinity House had other sources of revenue it was satisfied with the licence fees and did not charge the pilots for any of its administrative costs. The situation changed in 1873 when, after a further attempt to obtain incorporation and after three years of discussion with the Pilotage Authority and the shipping interests, the Montreal pilots were authorized to elect from their number a committee of five to look after their interests and to operate a *tour de rôle* system aimed at ending the ruinous competition that had plagued their profession. The Pilots' Committee opened an office at Quebec and hired an agent to look after the *tour de rôle* assignment of pilots. The resultant expenses were borne by the pilots themselves. But, in 1878, their Pilotage Authority (at that time the Montreal Harbour Commissioners) established a precedent that was not authorized by their charter by assuming the operational costs of the pilots' despatching office at Quebec. The result was that the pilots' agent became the Pilotage Authority's employee and, for the first time in the history of pilotage in Canada, a Pilotage Authority took over the management and the operation of the pilotage service. In 1885, the Pilotage Authority refused to continue to pay the operating costs so incurred and for that purpose levied a 2% deduction of the pilots' revenue. The pilots charged that the Pilotage Authority was making a profit out of them because the aggregate deduction exceeded the expenses incurred. Furthermore, they argued that, as they were paying the expenses, the despatching agent ought to be their own employee and not responsible to the Authority. This was one of the contentious points which caused the Montreal pilots' strike in 1897. This eventually resulted in another important precedent: the appointment of the Minister as Pilotage Authority in lieu of a local board. Although no special research was undertaken to determine whether at that time the Minister assumed the cost of the pilots'

office at Quebec and the remuneration of their despatcher, it is assumed that this was done, since this was to be the case wherever the Minister became the Pilotage Authority.

In 1905, the Minister took over from the Quebec Harbour Commissioners as Pilotage Authority for the District of Quebec. In his capacity as Minister of Marine and Fisheries, and not as Pilotage Authority, he concluded an agreement with the Quebec Pilots' Corporation to relieve the Corporation of the cost of providing and manning the pilot vessels and maintaining the pilots' despatching office at Quebec. The Crown furnished new pilot vessels and the Corporation sold its four schooners. As part of the bargain, the Minister engaged the Crown to indemnify the pilots for their increased costs resulting from the loss of board and lodging formerly available in their schooners. A meal allowance at the seaward station and also at Port Alfred and Chicoutimi was paid regularly by the Crown thereafter until it was cancelled in 1961. Furthermore since the number of pilots was considered too great, the Minister induced the senior pilots to retire by undertaking that the Crown would pay an annual pension of \$300, in addition to the normal pensions they were entitled to from their pilot fund. Four of these pensioners were still being paid in 1966.

When in 1914, following the Lindsay Commission, a special Act of Parliament (4-5 Geo. V c. 48) deprived the Pilots' Corporation of all its powers over the management and control of pilots and apprentices and gave these powers to the Minister of Marine and Fisheries as such, and not as Pilotage Authority, the Act also included the transfer of powers and responsibilities with regard to pilot vessels that the Minister had been enjoying since 1905, pursuant to the aforesaid agreement. In the 1927 C.S.A. the distinction between the Minister as Pilotage Authority (that is, as licensing authority) and as managing authority in place of the Pilots' Corporation is retained. The Minister as Pilotage Authority still has only the rights and powers of the Quebec Harbour Commissioners (sec. 395), since the pilotage dues that are payable elsewhere to the "Pilotage Authority" are by exception payable in Quebec to the "Minister". The legislature thereby clearly indicated that it is not in his capacity as Pilotage Authority because otherwise the distinction would be meaningless. At that time the Minister was also the Pilotage Authority for Montreal but the distinction is made only in the Quebec District where the Minister was acting in the two aforesaid capacities (sec. 456). Elsewhere, except with respect to the management of the Quebec Decayed Pilot Fund, the name of the Minister replaced the name of the Quebec Pilots' Corporation (secs. 491, 492, 493).

In 1934, all provisions dealing with the special status of the Minister as managing authority for pilotage operations in Quebec in lieu of the Pilots' Corporation were deleted from the Act, as were the provisions whereby the Minister as Pilotage Authority for the Districts of Quebec and Montreal had

only the powers of the public corporations he superseded. The result is that there exists no statutory provision giving anyone except the pilots themselves individually the right and the responsibility to provide the service. They have become free and independent entrepreneurs as they were before 1860, having the same status that the pilots had in law in all the other Districts. However, the Department continued to assume the operational costs both of the Minister as Pilotage Authority and those incurred as a result of the management and the operation of the service which he continued to assume in practice. This is the situation that now exists in all Districts (except pilot boat charges in Bras d'Or Lakes District) where the Minister is the Pilotage Authority.

Another precedent was set in the years 1948 to 1951 when the Crown recognized the necessity of maintaining an adequate pilotage service at Halifax, Saint John and Sydney, in the interest of the public. In order to give the licensed pilots of Saint John an incentive to pursue their profession, the Department of Transport included in its estimates certain sums that could have been paid to the District pilotage fund if the average earnings of the pilots in these Districts fell below a reasonable level. In the estimates of 1949/1950 the amounts so provided are: Halifax \$5,000, Saint John and Sydney \$2,500 each (transcript of evidence Vol. 133, page 17010). However, trade increased and the Crown never had to make any of these payments.

The question of Government assistance and subsidies was touched on in the report of the Audette Committee (Ex. 1330). The Committee recommended that similar assistance be extended to all other Districts where the Minister was the Pilotage Authority. This recommendation was based simply on the ground of discrimination and was made without ascertaining whether the reasons that warranted Government assistance, for instance, in Quebec, existed in the other Districts. In its report the Committee remarked that:

"... the State has made certain monetary contributions towards the expenses of pilots in various districts, and has further placed at their disposal certain administration machinery to effect tasks which otherwise would have to be done by the pilots themselves or by other persons at their expenses."

...

"In all districts, excepting that of Montreal, certain pilot vessels are essential. In the Quebec district a Government vessel has been made available to the pilots over a long period of years without cost to the pilots of that district. In most other districts the pilot vessels are maintained at the expense of the pilots themselves though varying forms of relief have been granted recently by the Government in certain districts. This variation in practice has produced certain resentment among those who have benefited to a lesser extent, or not at all, from the expenditure of public funds. During the course of our hearings we found this resentment to have reached a very acute point in the district of Halifax. This is partially due to the somewhat confused situation prevailing in that district in relation to the expense of maintaining the pilot vessels. However, it is probably due in much greater part to the fact that during the war the same vessel that is provided gratuitously by the Government for the use of the Quebec district pilots at Father Point was made available to the Halifax district for sometime and the pilots of this district were required to make a substantial payment for its use ...

However, your Committee does feel that, in this instance, the Halifax pilots may well have had cause for complaint." "The varied practice throughout the different districts over a period of years, the present difficulties with which the pilots are faced in their finances, the public interest in the services rendered to transportation by the pilots and a desire to dispel any inequity that may exist, have influenced the thoughts of your Committee in relation to this much disputed subject. We have reached the conclusion that we should recommend the assumption by the Government of the full cost of acquisition, operation, maintenance and replacement of pilot vessels in the Sydney, Halifax, Saint John and British Columbia districts . . ."

For similar reasons the Committee also recommended the assumption by the Government of the cost of operating the pilot stations in these Districts.

The Audette Committee's report is dated November 29, 1949. On January 25, 1951, by P.C. 120/422, the Government was authorized to assume, effective April 1, 1950, the cost of operating, maintaining and replacing pilot stations and of providing pilot vessel service in the Districts of Sydney, Saint John, Halifax and British Columbia. The grounds for this extraordinary measure are set out in the preamble of the Order in Council, i.e. "with a view to assuring adequate remuneration for the pilots . . ., and to avoiding increases in pilotage rates . . ." (Ex. 52).

The same year, P.C. 164/1166 approved financial assistance to cover the cost of maintenance, operation and repairing of pilot vessels in the Pilotage District of Bras d'Or Lakes. It amounted to \$200 per year which was raised to \$500 in 1954 (P.C. 1954/37/590) and to \$750 in 1960 (P.C. 36-257). The subsidy was discontinued in October 1963 when the necessary funds were raised from shipping through an appropriate increase in the pilotage dues (pilot boat charges). On March 5, 1964, the Orders in Council authorizing the grant were revoked (P.C. 1964-24/336) (Ex. 1497a).

In 1959, on the same ground of discrimination, the same assistance that had been granted to the Districts where the Minister was Pilotage Authority was extended to the Districts of St. John's, Newfoundland, and New Westminster (P.C. 1959/19/1093). But, in order not to increase the expenditure of government funds, shipping was required to meet part of the cost through the device of a pilot boat charge that the Pilotage Authorities concerned were required to include in their By-laws and pay over to the Crown when collected, i.e., \$10 for pilot boat service in the Districts of Sydney, Halifax, Saint John, N.B., St. John's, Nfld., British Columbia and New Westminster, and \$20 at Father Point, Quebec. In these Districts, except Quebec, the Crown undertook to reimburse half the cost of hiring privately-owned pilot boats where no regular service existed (Ex. 52). This is the situation that now prevails.

As seen above, prior to 1959, the Crown sought no reimbursement from either the Pilotage Authorities, the pilots, or the shipping interests for the

services and assistance it provided. The first step of this nature took the form of a pilot boat charge in 1959. Up to then, the practice had been to make a single aggregate charge for pilotage dues. When fixing the tariff, the Pilotage Authority concerned had taken into consideration the pilots' transportation costs to and from vessels. On this occasion, the same method could have been followed by increasing the existing rates by the amount charged by the Department of Transport for the use of its pilot vessels. Instead, a new procedure was adopted. The increased charges took the form of a separate item of pilotage dues, that is, the pilot boat fee (except in the Churchill District where, up to 1966, only an aggregate charge was made). In fact, this consisted of a substantial overall increase in pilotage costs to shipowners, but by making the pilot boat charge a separate charge additional to the regular pilotage dues, rather than combining both, the impression was not left that the pilot vessel service was being paid for by the pilots out of their own revenue.

Another precedent was established by splitting the pilotage dues into two parts, one ear-marked for the payment of the pilots' own operational costs, namely their transportation expenses, and the other the pilots' remuneration. The St. Lawrence Pilots' Federation recommended extending this system to cover all pilotage costs.

This additional charge brought substantial revenue to the Department of Transport. In 1964, for instance, the revenue derived from the pilot boat charge at Les Escoumains in the Quebec District amounted to \$153,920, and a surplus over the total cost of operation of the pilot vessel service at that station of \$7,000. But this is only part of the cost incurred by the Government for operating the District. For example, in 1964, the cost of operating the two pilotage offices in the Quebec District, i.e., at Quebec and Les Escoumains, amounted, in round figures, to \$114,000. After taking into account the \$7,000 surplus from pilot boat operations at Les Escoumains, the Crown had to pay \$107,000 in the Quebec District that year.

In 1961, the Treasury Board reacted to the increasing amount paid by the public to operate the pilotage service throughout the country and suggested these payments were no longer justified in view of the high level of income being received by most pilots. As a result, the pilots of some Districts were asked to contribute part of their revenue to pay general pilotage expenses. *Inter alia*, the Quebec pilots were asked to contribute 4% and the Saint John, N.B., pilots 25%. This proposal was one of the main points of contention that caused the 1962 strike by the St. Lawrence River pilots, a walk-out which the British Columbia and the Saint John pilots threatened to join.

On this occasion the Department of Transport did not use the same strategy it had employed when establishing the pilot boat dues: instead of increasing the dues in order to pass the cost on to the shipping interests, it tried to charge the pilots, thereby decreasing their earnings.

The Pilots' Federation recommendation is to the effect that the pilotage dues be composed of two items, the first to defray the operational and administrative costs of the District; the second reserved solely for the remuneration of the pilots. Both should be determined separately and the pilots should play no part in fixing the level of the first item.

EXTENT OF SUBSIDIES

The study of the cost of pilotage in Canada for the five year period 1961 to 1965 (vide *General Introduction*, p. 12) made by the firm of chartered accountants, McDonald, Currie & Co. (vide Appendix IX), reveals that direct and indirect subsidies paid by the Government to assist pilotage services in Pilotage Districts governed by Part VI of the Act covered between 16% and 13% of the total cost; the rest was met by pilotage dues, i.e., borne by shipping. In 1965, the total cost amounted to \$8,820,364, of which \$7,625,781 was borne by shipping and \$1,194,583 was "Cost to Government"².

The situation both in money and percentage for the five years is as follows:

Year	Total Cost of Pilotage		Cost to Shipping		Cost To Government	
1961.....	\$6,899,163	100%	\$5,758,144	84%	\$1,141,019	16%
1962.....	\$7,075,182	100%	\$6,012,578	86%	\$1,062,604	14%
1963.....	\$7,257,920	100%	\$6,159,435	84%	\$1,098,535	16%
1964.....	\$7,821,818	100%	\$6,726,944	86%	\$1,094,874	14%
1965.....	\$8,820,364	100%	\$7,625,781	87%	\$1,194,583	13%

While during these five years the "Total Cost of Pilotage" increased by 28% (\$1,921,201)³, the amount in dollars of Government assistance remained substantially the same, with the result that there was a slight decrease in percentage. The major portion of the increase, i.e., \$1,786,803, was pilots' gross income which is paid out of pilotage dues (vide Appendix IX, para. 76). The apparent static situation in "Cost to Government" is mainly due to savings attained by relocating the Quebec seaward station from Father Point to Les Escoumains which permitted the use of smaller and less expensive pilot vessels, thus changing a large operational deficit to a slight surplus in 1964, and the gradual closing down of the Marine Reporting Service now

² The Government's total financial involvement in 1965, including the Great Lakes area (administered under Part VIA C.S.A.) and Goose Bay (where pilotage is performed by two D.O.T. employees) was 15% of the total cost, the balance being borne by shipping, i.e., Total Cost \$11,945,812. Cost to Shipping \$10,642,851, and Cost to the Government \$1,302,961. For details, reference is made to Appendix IX, paras. 9 and 10.

³ For an analysis of the increase in Cost to Shipping, vide Appendix IX, McDonald, Currie & Co. study, paras. 77-80.

being replaced by a more modern and efficient but more expensive marine traffic control system (vide Part IV, Quebec District, *Marine Reporting Service*), the cost of which, for accounting purposes, is, under the present arrangements, charged to the Marine Hydraulics Branch of the Department of Transport and, therefore, is no longer included as a component in the pilotage "Cost to Government". This change in departmental accounting procedure materially modifies the financial picture for the purpose of comparison and statistics. These factors have concealed the substantial increase in administrative cost to Government in the pilotage field, as indicated hereunder without (item *Total*), and with (item *Grand Total*), the item *Marine Reporting Service*. (Vide D.O.T. letter dated August 30, 1967, Ex. 1522). (Vide also Comments contained in Appendix IX, McDonald, Currie & Co. study, paras. 81-85.)

Cost to Government	1961	1965	Difference	
H.Q. Administration.....	\$ 59,006	\$ 113,383	\$ 54,377	+ 92%
District Administration.....	441,200	536,200	95,000	+ 22%
Pilot Vessel Service.....	486,600	448,000	-38,600	- 8%
Total.....	\$ 986,806	\$ 1,097,583	\$ 110,777	+ 11%
Marine Reporting Service.....	154,213	97,000	-57,213	- 37%
Grand Total.....	\$ 1,141,019	\$ 1,194,583	\$ 53,564	+ 5%

At the District level, the picture is different. Although, generally speaking, for any given District the Cost to Government figure remains practically unchanged from year to year, there is a striking difference between them. The distribution of Government assistance and its components for the year 1965 is analysed in Table "A", to follow. The Districts which received Government assistance are listed by order of decreasing total cost, by Districts where the Minister is Pilotage Authority and Commission Districts. The figures are taken from Schedule 1 to the McDonald, Currie & Co. study (Appendix IX). The Ottawa Headquarters expenses of \$113,383 (\$148,000 when the Great Lakes and Goose Bay are included) have been pro-rated among Districts receiving assistance from D.O.T. on the basis of their respective total cost. Their share is included in the items "Total Cost per District" and "Cost to Government" which accounts for the slight increase over the corresponding figures found in the McDonald, Currie & Co. study. Such an arbitrary rule was necessary because there are no data on which to base calculations. Reference is also made to the analysis of these costs to the Government which are contained in paras. 55 to 69 of the McDonald, Currie & Co. study.

In addition to the qualifying remarks contained in the McDonald, Currie & Co. study, it is important to note the following:

- (a) The item "Administration Cost" is not necessarily what was spent for the District where it appears. Consequently, this slightly affects the item "Cost to Government" in each of these Districts, although the Government total cost is exact. There are no data to permit appraisal of the value of the administrative services rendered by one District to another.
 - (i) In the case of contiguous Districts, part of this expense is for the administration of the pilotage service of the adjacent District. For instance, despatching Montreal River pilots up-bound is effected by the Quebec District headquarters as a service to the Montreal District.
 - (ii) The reason why the Bras d'Or Lakes District administration item is shown as "nil" is because its administration is carried out by the Superintendent of the District of Sydney.
- (b) The financial statement does not give the true picture of the Churchill District. Indirect assistance is given by providing the pilots with an additional source of income by employing them as Port Warden and Assistant Port Warden at the same time, and by utilizing as pilot vessels the two harbour tugboats operated by the National Harbours Board. There would be a substantial deficit if the Department of Transport had to provide and maintain an exclusive pilot vessel service. Also, a direct subsidy would be required to provide reasonable remuneration for the pilots if they were not also employed as Port Wardens and paid accordingly.
- (c) The "Cost to Shipping" is limited to that paid as pilotage dues, but does not include other costs paid by shipping in connection with the service. Three examples are:
 - (i) the transportation of pilots when paid directly by ships to private contractors furnishing pilot boat service in the Harbour of Quebec, at Three Rivers and in Montreal Harbour, which in the year 1965 is estimated at \$250,000;
 - (ii) the unofficial remuneration of \$25.00 per trip paid by most ships of the Shipping Federation to apprentice pilots in the Districts of Quebec, Montreal and Cornwall, but for which no record is kept;
 - (iii) the cost to shipping of pilotage services operated outside federally established Districts.

TABLE "A"
ANALYSIS OF DIRECT AND INDIRECT SUBSIDIES (COST TO GOVERNMENT) PAID IN 1965
TO DISTRICTS GOVERNED BY PART VI C.S.A.

Districts	Total Cost per District		Cost to Shipping		Cost to Government		Components of % Cost to Government			
	\$	% over Grand Total	\$	% of the District Costs	\$	% of the District Costs	H.Q.	Dist. Admin.	Pilot Vessel Reporting Service	Marine Service
Districts Where the Minister is the Pilotage Authority:										
Montreal.....	2,821,123	32.0	2,588,613	91.76	232,510	8.24	1.32	5.92	—	1.0
Quebec.....	2,014,446	22.8	1,791,176	88.91	223,270	11.09	1.32	5.86	0.5	3.41
British Columbia.....	1,898,314	21.5	1,636,276	86.2	262,038	13.8	1.32	6.16	6.32	—
Cornwall.....	668,265	7.6	607,451	90.9	60,814	9.1	1.32	7.78	—	—
Halifax.....	410,139	4.7	255,729	62.35	154,410	37.65	1.32	9.75	26.58	—
Saint John, N.B.....	260,086	3.0	138,456	53.23	121,630	46.77	1.32	6.81	38.64	—
Sydney.....	160,029	1.8	88,919	55.57	71,110	44.43	1.32	14.68	28.43	—
Bras d'Or Lakes.....	26,680	0.3	26,328	98.68	352	1.32	1.32	—	—	—
Churchill.....	10,985	0.12	10,840	98.68	145	1.32	1.32	—	—	—
	8,270,067	93.8	7,143,788	86.4	1,126,279	13.6				
Districts Where a Local Commis- sion is the Pilotage Authority:										
New Westminster.....	174,653	1.98	150,347	86.08	24,306	13.92	1.32	—	12.6	—
St. John's, Nfld.....	151,504	1.72	107,506	70.96	43,998	29.04	1.32	0.66	27.06	—
	326,157	3.7	257,853	79.1	68,304	20.9				
Total for Districts Receiving Government Assistance.....	8,596,224	97.5	7,401,641	86.1	1,194,583	13.9				
Total for Remaining 14 Districts (All Commission Districts) Re- ceiving no Assistance.....	224,140	2.5	224,140	100.0						
Grand Total.....	8,820,364	100	7,625,781	87	1,194,583	13				

The revealing figures in Table "A" prompt the following observations:

- (a) Of the 25 Districts (26 before the abrogation of Lewisporte in 1964) only 11 received financial assistance from the Government and the remaining 14 (all Commission Districts) met all the cost of administration and operations out of pilotage dues; in other words, the total cost in these 14 Districts was borne by shipping.
- (b) Most pilotage in Canada (not counting the Great Lakes) is performed in 9 of these 11 Districts which account for 97% of the total cost of pilotage and receive, between them, all Government pilotage assistance (excluding a small fraction of Ottawa Headquarters expenses). The aggregate total cost of the 14 Districts receiving no Government assistance amounts to only 2.5% of the grand total.
- (c) Government assistance for all 11 Districts varies considerably in amount and percentage of the total cost. For instance, in 1965, the amount for the District of Halifax was \$154,410, i.e., 37.65% of its total cost, while in Montreal it amounted to \$232,510, i.e., only 8.24% of its total cost.
- (d) The table indicates the relative importance of the various Districts, *inter alia*, the St. Lawrence sector, composed of the Districts of Quebec and Montreal, remains the most important pilotage area in Canada and accounts for 54.8% of the total cost of pilotage in Canada (Great Lakes excluded).
- (e) River pilotage in the St. Lawrence Districts, i.e., Montreal, Quebec and Cornwall, and coastal pilotage in British Columbia, account for 83.9% of the total cost of pilotage in Canada. This alone reveals the inadequacy of the present pilotage legislation which was conceived solely for port pilotage (vide C. 3, pp. 49 and ff., and C. 7, p. 218).
- (f) The deciding factor whether or not to provide Government assistance is not the importance of a District but its actual financial need, always assuming the service is required in the public interest. For instance, pilot vessel service in Quebec Harbour, at Three Rivers and in Montreal Harbour is not provided by the Department of Transport, as at Les Escoumains, because the requirement is adequately met by private contractors; this could not be done at Les Escoumains without subsidizing the operation or increasing the pilot boat charge substantially. In "Cost to Government", while the item "Administration" tends to be proportionate to the financial importance of the District, and increases with the volume of pilotage requirements, this is not the case with the overall cost of pilot vessel service (vide Appendix IX, McDonald, Currie & Co. study, paras. 27-33). This substantial item is not governed by the demand for pilotage, but dictated by the prevailing conditions in

boarding areas. For instance, very substantial savings were made by transferring the Quebec eastern boarding station from the exposed, remote boarding area off Father Point to the vicinity of Les Escoumains, which is much closer to shore and less exposed. This move made it possible to replace the large pilot vessels required at Father Point, which had to provide sleeping accommodation for the pilots, by much smaller ones at Les Escoumains, that comfortably shuttle between the shore station and the boarding area. What was formerly a very expensive operation is now close to making a profit. For the same reason as at Father Point, large expensive pilot vessels must be maintained at Halifax and Saint John, N.B. Furthermore, in these two Districts, the same pilot vessel service has to be maintained throughout the year despite the fact that pilotage is greatly curtailed outside the winter season. The pilot vessel service provided at Sydney and St. John's, Newfoundland, is costly when expressed in percentages because of the relatively small amount of pilotage in these Districts.

The present situation is, therefore, a complete departure from the basic principle of the 1873 Pilotage Act which, in this respect, passed unchanged into Part VI of the present legislation, namely, each Pilotage District is expected to be independent and self-supporting financially and the operational costs of the service are considered the pilots' responsibility, which principle has been, and continues to be, ignored, notwithstanding the law.

REASONS ADVANCED FOR GOVERNMENT ASSISTANCE

The reasons why the Government provided assistance are mainly the following:

- (a) the practical impossibility, in certain Districts, of requiring shipping to bear the overall costs needed to provide an adequate, efficient pilotage service, including a reasonable income for the pilots;
- (b) the consideration that it is in the public interest to maintain a pilotage service even though it is not financially self-supporting;
- (c) the principle that there should be no discrimination in the method of subsidizing the pilots.

The last reason is obviously a fallacy because needs and operational costs can not be compared between Districts. The main question is whether at a given place it would be realistic to charge shipping the full costs of pilotage service. If the answer is in the negative, the next question is whether public interest requires an adequate pilotage service in that locality: if it does, the Government has good reason to provide whatever assistance is needed to ensure an adequate service; if not, the District should be abolished.

The reason why the Department of Marine and Fisheries assumed responsibility for pilot vessel service at the seaward station in the Quebec District in 1904 was, no doubt, because the Quebec Pilots' Corporation was not financially able to provide the pilot vessel service that became necessary with the advent of larger steamships which required more sea room to manoeuvre in the boarding area than was available off Bic. This meant replacing the pilots' schooners owned by the Pilots' Corporation with expensive steam pilot vessels because the intended boarding station off Father Point was exposed and provided no shelter for the schooners. The Corporation was not in a financial position to provide new vessels unless there was a substantial increase in the rates, a step which the shipping interests would have strongly opposed.

During the depression years the Government guaranteed the Halifax, Saint John and Sydney pilots a minimum annual income. At that time, shipping was unable to pay higher pilotage dues; in fact, in the St. Lawrence River Districts during that period, a 15% to 25% overall decrease in dues was effected in order to assist shipowners.

ECONOMIC IMPACT OF PILOTAGE COSTS

In most Pilotage Districts, the provision of an adequate, efficient pilotage service has become a public necessity. Hence, it must be determined whether or not shipping can reasonably be asked to bear the full cost of the service in these areas. In this connection, the incidence of pilotage rates on the cost of shipping and on the Canadian economy should be considered.

After studying the evidence adduced at the hearings on the matter and the official economic available data, the Commission concluded that pilotage rates being charged in the various Pilotage Districts are not excessive, and that their incidence on the overall cost of water transportation of goods is in fact minimal; that, therefore, the Canadian economy in general would by no means be adversely affected if the dues had been increased to meet the full cost of pilotage in Canada which, as of 1965, would have meant an overall increase of 13%, providing a satisfactory mechanism had existed to distribute the accruing revenues so as to meet the operating deficits of each District.

It was also realized that it would be unrealistic to insist on the principle that each District, where the service is maintained in the public interest, be financially self-supporting. The disproportionately high rates that would have to be charged in some Districts would defeat the main purpose of maintaining a service by making the port or area unduly expensive. In such cases, outside financial aid is required. Whether the necessary funds should come from shipping, by imposing an overall surcharge to create an equalization fund administered by a Central Authority, or directly from public funds, is a question of policy which is the subject of a Recommendation.

At the request of the Commission, the question was studied by a firm of economic consultants, J. Kates and Associates, and their report titled "Evaluation of the Economic Impact of Pilotage Costs" confirms the Commission's conclusions. The report is reproduced *in extenso* as Appendix X.

The five main questions to which the study was directed were:

- (a) What is the relative impact of pilotage costs on Canadian trade?
- (b) What is the trend in pilotage costs?
- (c) How do pilotage costs influence vessel operations?
- (d) Does the cost of pilotage service for access to Canadian ports cause traffic to be diverted to U.S. ports?
- (e) Would the Canadian economy benefit more if the cost of pilotage were assumed by the Government?

The consultants' conclusions are summed up in Paragraph 1.0 of their report, as follows:

"1.0 SUMMARY

- 1.1 In 1963 the cost of pilotage services for access to Canadian ports of trade accounts for about 90¢ per \$1,000 of the final value of merchandise traded. This is less than one-tenth of one per cent. Even if all costs of pilotage, including those now borne by government, were paid by shipping, the cost would average \$1.05 per \$1,000 of the final value of the goods traded. Pilotage costs are too small relatively to have a noticeable impact on trade.
- 1.2 A comparison of 1963 pilotage dues in Canadian districts and ports and major U.S.A. and European ports and channels shows that the dues charged in Canada are substantially lower for medium and large ocean vessels, and in some cases higher for very small vessels. Most ocean vessels engaged in Canadian overseas trade are medium and large in size and the trend to larger vessels will continue. While total pilotage costs to the ports of Montreal and the Great Lakes are higher than the cost of pilotage for access to most European ports and New York, the reason is simply the greater distances involved in access to these inland Canadian Ports. On the whole, the costs of pilotage for services performed in Canadian waters compares very favourably with pilotage costs in U.S.A. and European waters.
- 1.3 The trends in shipping and in the value of trade versus pilotage costs indicate that the relative impact of pilotage costs has been declining moderately since 1963.
- 1.4 The attention that the cost of pilotage has received in submissions to the Royal Commission on pilotage is mainly because these costs are not subject to the discipline of the market place in the same way as are most other costs of vessel operations. The main recourse vessel operators, agents and shippers have in the direct control of pilotage costs is representation or protest to appropriate government officials or agents.
- 1.5 It is a common experience, wherever prices and utilization of services or resources are regulated by governments under conditions which vary widely, that anomalous situations do develop. However, this evaluation has been confined to the question of whether pilotage costs, in general, present a serious threat to Canadian trade and the Canadian economy.
- 1.6 Pilotage costs are more significant relative to the trade carried in ocean vessels to and from the ports of the Great Lakes. However, most traffic which might conceivably be diverted because of the relatively small proportion of costs attributable to pilotage requirements would not be a serious loss to

Canada. Some of it would be diverted to Canadian lake vessels and some, principally U.S. grain, might go by other U.S. ports. In general, there is very little Canadian trade lost and very little trade diverted from Canadian trade routes because of pilotage costs on the St. Lawrence Seaway and Great Lakes.

- 1.7 It would not be in the long term interest of the Canadian economy to have the government bear all or most of the cost of pilotage services. At the same time, there are situations where government assumption of some of the cost burden and some of the risk in maintaining a high level of service is justified."

GENERAL COMMENTS

It is considered that the present statutory provisions which deal with the handling of various pilotage monies are inadequate even for the type of organization foreseen in Part VI. Furthermore, as a result of various amendments, these provisions have become unnecessarily complicated, illogical and are often meaningless.

The greater involvement of the state in pilotage requires a more elaborate financial procedure which should be fully enunciated in future pilotage legislation because this, not being governed by local peculiarities, is not a subject-matter for regulations.

Future legislation should provide for an adequate scheme of financing to enable each Pilotage Authority to ensure the quality and adequacy of the pilotage service for which it is now responsible and for any additional responsibility that may be imposed in the future, even if this means provision for obtaining money from public funds to meet an operational deficit where the service is maintained in the public interest.

Chapter 6

NATURE, COMPUTATION AND COLLECTION OF PILOTAGE CHARGES INCURRED BY SHIPS

The pilotage charges that the Canada Shipping Act requires shipping interests to pay are:

- (a) pilotage dues;
- (b) fines or penalties for infractions;
- (c) indemnities and expenses for board, accommodation and travelling to which pilots are entitled if they are overcarried or detained in quarantine.

In practice, however, pilotage dues are the main and almost sole charge. No fine or penalty has been imposed on a vessel for violating Part VI of the Act, at least in the last decade, and indemnities to pilots for overcarriage or detention in quarantine are both rare and minimal (\$15 per day of absence or detention, secs. 359 and 360).

I. PILOTAGE DUES

Despite the existence of a limiting statutory definition (subsec. 2(70)), the term "pilotage dues" derives two other substantially different meanings from the context of the Act.

- (a) The normal meaning is contained in the statutory definition "the remuneration payable in respect to pilotage", i.e., the price that a ship has to pay for each pilotage service or, in other words, the pecuniary consideration of a pilotage contract (even if the pilot is not allowed to provide service after being taken aboard for that purpose (sec. 352)).
- (b) In Districts where the payment of dues is compulsory, the term also means the amount of liquidated damages owed by a ship for breach of a pilotage contract, real or presumed by law (secs. 348 and 350).
- (c) The term also means the penalty imposed on non-exempt ships which failed to hire a pilot in Districts where the payment of dues is compulsory (secs. 345 and 357).

In these last two instances "pilotage dues" is obviously a misnomer, not only because the term refers to different subjects, but also because giving it these meanings violates the basic rules of the interpretation of statutes. The only element the three definitions all have in common is that the amount involved is stated. In the United Kingdom Pilotage Act (subsec. 11(2)), the penalty referred to in (c) above is called a fine.

The aggregate amount of the dues collected is referred to as the "Cost to Shipping" of the pilotage service which, together with the direct and indirect subsidies paid by the Government (Cost to Government), forms the total cost of pilotage (vide McDonald, Currie & Co. financial study, Appendix IX to the Report).

A. PILOTAGE DUES FOR SERVICES RENDERED

As stated above, the basic statutory meaning of "pilotage dues" is the price a ship must pay for various pilotage services. At present, the charges are listed in a schedule to the By-law of each District, generally referred to as the tariff. Like the rest of the By-law, each schedule is a regulation made by the Pilotage Authority; the authority for the tariff is subsec. (h) of sec. 329 C.S.A. Once these rates have been established, they are legally binding on all concerned and can not be varied except by an amendment to the By-law approved by the Governor in Council. Because the Act gives Pilotage Authorities the prerogative to "fix the rates . . . in respect of pilotage dues", it is mandatory for each Authority to exercise this right fully and to include in the tariff a charge for every type of pilotage the pilots may be called upon to perform within the limits of their District or, at least, to lay down a formula by which the charge can be computed. An incomplete tariff is an undue restriction on pilots in the exercise of their profession and the provision of service to vessels since they can not be expected to perform gratis services for which no charge has been established. In Districts where the payment of pilotage dues is compulsory, a deficient tariff has the effect of an indirect, illegal exemption. For example, for many years prior to 1960, despatching two pilots on winter assignments was recognized as a necessary safety measure and, unofficially, the second pilot was always paid but, because it was not provided for in the tariff, he had no legal claim. Moreover, if he accepted whatever the ship was prepared to pay he committed an offence prohibited by sec. 372 of the Act. A proper charge has since been included in the tariffs of the three St. Lawrence Districts.

Another example was provided by ships merely in transit through the British Columbia District. Under the 1960 By-law they were indirectly exempted because the tariff provided charges only for trips which originated or terminated in a port within the District. The result was that no charge was made when no pilot was employed and also the Superintendent remained uncertain what to charge when a pilot was employed during such a transit.

Because this very seldom happened, a reduced charge was made by applying only the mileage component of the tariff. This practice had two disadvantages: the charge was both too low in comparison with normal pilotage assignments of similar length and also illegal in that it was not established in the tariff. The irregularity was corrected in 1965 (P.C. 1965-1084).

1. Types of Pilotage Service

- (i) "pilotage voyage"¹ (often referred to as trip) is a journey, or that part of a journey, made by a ship within the limits of a District for the purpose of reaching a destination. It is completed when the ship reaches her destination within the District or crosses the district limits (sec. 361), but it is not completed when interrupted temporarily by events beyond the ship's control, such as being forced by stress of weather to anchor, or even to berth, en route. Within a District it may vary in distance. In the harbour type District, there are normally only two kinds of voyage, i.e., inward and outward. In the contiguous Districts of Quebec, Montreal and Cornwall as well as in the B.C. District, there are also transit voyages. Finally, in river and coastal Districts, there are voyages wholly performed inside the District;
- (ii) moveage, which in the By-law means the movement of a vessel within a given harbour from one place to another;
- (iii) trial trip, whose purpose is to carry out various manoeuvres to test a ship's performance;
- (iv) compass adjustment trip, during which a ship proceeds on various courses to test the accuracy of her magnetic compass;
- (v) direction-finder calibration trip, similar to (iv) to adjust direction-finder equipment;
- (vi) security watch, when the services of a pilot are required on board a ship at anchor or secured to shore, for various reasons, principally because it is feared she may go adrift due to severe adverse weather conditions;
- (vii) requirement for two pilots, i.e., when two pilots are required on board for safety seasons. The second pilot either acts as relief pilot during long trips or as assistant pilot if conditions are such that

¹The term "voyage" is ambiguous and its statutory non-restrictive definition (subsec. 2(112) C.S.A.) does not clarify the situation: "'voyage' includes passage or trip or any movement of a ship from one place to another or from one place and returning;...". It is considered that a much more restrictive term should be found to define in pilotage legislation "pilotage voyage" as described above. It is believed that "trip" would be adequate provided the other meanings given to this term in regulations and pooling rules are discontinued. For details, vide Part IV, Quebec District, Pilotage Operations, Despatching.

the pilot in charge needs the aid of a person with special knowledge, e.g. winter navigation, manoeuvring a large ship in confined waters, or navigating a difficult tow;

- (viii) detention, i.e., when a pilot's availability is retained for the ship's convenience;
- (ix) cancellation, i.e., a request for pilotage service is cancelled after a pilot has been ordered and has reported for duty;
- (x) special types of pilotage service peculiar to a District, e.g. in the B.C. District the tariff lists a charge for "gun trials or other exercises under Royal Canadian Navy control" (B.C. By-law Schedule, subsec. 4(3)), or services required by special circumstances, e.g. if a pilot is employed to navigate a salvage vessel engaged in salvage operations, or a cable-laying vessel.

2. Omissions in tariffs

None of the existing tariffs observes the principle that the schedule should contain a charge for every pilotage service that could possibly be performed in the District. They list only the cost of services normally provided and do not indicate how the charges for unusual services are computed. In fact, in most small Districts prices are fixed only for inward and outward voyages and movages (vide Bathurst, Botwood, Buctouche, Caraquet, Churchill, Humber Arm, Miramichi, Pictou, Port aux Basques, Prince Edward Island, Pugwash, Restigouche River, Richibucto, Shediac and Sheet Harbour).

Only the Halifax District tariff provides a charge for security watch (subsec. 7(2)). In some Districts the detention charge is applied despite the fact that it refers to a totally different situation. Nowhere is there provision for the price to be paid for the services of a second pilot when a double assignment is effected for the safety of a ship, except for the special cases of winter navigation in the St. Lawrence Districts, and pilotage trips of long duration in the B.C. District.

Because the Act does not provide any alternative method of fixing rates for services not covered in the tariff, Pilotage Authorities, instead of trying to devise By-law regulations for computing the price for uncommon or unusual services that might occasionally be performed, have resorted to the illegal device of arbitrarily fixing *ad hoc* prices wherever necessary. As seen above, this was the practice when dealing with transit trips in the B.C. District until the 1965 amendment. It is still the practice in the Quebec District for trial trips and security watches.

3. Criteria For Fixing Rates

The Act does not state what criteria a Pilotage Authority should follow when fixing rates nor what form rate-fixing should take in the regulations. When the basic organizational scheme now prescribed in pilotage legislation was originally drawn up it was not necessary to provide any statutory rules or criteria governing the exercise of the power to fix rates by regulation because, at that time, the Pilotage Authority was a completely disinterested party whose functions were limited to licensing. Furthermore, the free enterprise system prevailed, the number of pilots was usually unlimited, the Authority was not concerned with sharing assignments and, since pilotage was considered a private service to shipping, only the interests of the immediate parties had to be considered.

Under these circumstances the yearly income a pilot could earn depended on a number of material factors in addition to pilotage rates: his ability to attract clients, his eagerness to work and his qualifications. Like any other professional man, his reputation was a determining factor.

In the original context of the Act the charges were expected to be a reasonable remuneration for services rendered. The dues for a given service amounted to what the contracting parties would normally have agreed upon if they had been free to bargain, i.e., the Master could employ a pilot or not while the pilot could offer his expert services but was not obligated either to seek or to accept employment.

Under Part VI C.S.A. it is still no concern of the Pilotage Authority whether the rates are high enough to attract the best qualified persons or whether there are sufficient ships trading in the District to provide each pilot a reasonable income, thus ensuring that the service is maintained and that standards of qualification do not drop. The main function of the Pilotage Authority is to make sure through licensing that those persons who want to practice the profession of pilotage have the required qualifications. It is not concerned whether candidates apply or whether those already licensed wish to withdraw. Part VI of the Act does not foresee any scheme for organizing a pilotage service where none existed before, nor for maintaining a service; if no qualified pilots are found, the District is abolished.

Therefore, the Pilotage Authority under Part VI is in the unbiased position necessary for exercising the virtually judicial power of imposing its decisions on the parties directly concerned. The fact that the Pilotage Authority draws most of its expense money from pilotage dues does not alter the situation; the extent of the tariff has no bearing on what the Pilotage Authority may collect from the pilots or deduct from their pilotage dues to meet its operating expenses. It is not allowed to make a profit or to accumulate any reserve, but can assess the pilots only the amount needed to meet any outstanding balance.

The factual situation is, however, totally different because the Pilotage Authority is no longer the disinterested judge contemplated by the Act. Therefore, it is necessary to re-assess the situation. As seen before, because pilotage in most Districts is provided in the public interest, the Pilotage Authorities have assumed the additional responsibilities of maintaining the service and ensuring the availability of a sufficient number of qualified pilots. The free enterprise system has disappeared and neither the shipping interests nor the pilots are the free parties the Act presupposes with the result that the Pilotage Authority now has a personal interest in seeing that its pilots receive an equitable annual income which, combined with working conditions, is tempting enough to prevent them from leaving the service and to attract qualified, competent candidates. It controls the pilots' annual income by distributing the workload fairly, by pooling their earnings, by limiting them to the number necessary to meet the normal extended peak demand and by fixing the charges for their services. Hence, the situation has changed materially because the Pilotage Authority is now interested in what rates are established.

In the past, the rates did not have as direct an impact as at present. As indicated above, personal factors in the free competition system made the main difference between a reasonable income and remuneration so inadequate that the pilots were forced to seek other employment. Now, with controlled pilotage, the tariff has an immediate, direct effect on all the pilots. When their workload can no longer be increased, the only way to augment their income is to raise the rates, except when charges are computed according to the dimensions of vessels, in which case an increase in size automatically produces more revenue. But an increase in the number of ships has only a limited effect, because if the workload passes a certain level additional pilots will be licensed. This explains why the pilots consider the rates their most important mutual problem wherever controlled pilotage has been established.

As early as 1899 the Miramichi pilots, whose earnings were pooled, went on strike because the Pilotage Authority lowered the rates without consulting them. Ever since, the tariff has been the subject of most of the demands made by the pilots and of the numerous disputes that have flared up between the pilots and the shipping interests and between pilots and Pilotage Authorities. For example, it was because the B.C. Pilotage Authority, following the recommendations of the Robb Commission, tried to lower the pilots' annual share of pilotage earnings that the B.C. pilots went on strike in 1920. Because the controversy was considered insoluble at that time the B.C. District was abolished, effective May 6, 1920.

Again, in 1960 it was a question of rates that brought the Quebec pilots to the verge of a strike. Their main concern was a readjustment of the tariff to maintain the aggregate earnings of the pilots at the same level as before

the abolition of the special pilot system. At that time the remuneration of the second pilot in winter assignments was a point of contention in the three St. Lawrence Districts. In 1962 it was an attempt by the Government to lower the pilots' income by making them pay all, or part, of District operating costs without any increase in the tariff that caused the strike of the St. Lawrence pilots. The Saint John, N.B. and the B.C. pilots, who were similarly affected, threatened to walk out in sympathy.

Whether or not pilots are on a fixed salary, the present situation as regards rate-fixing is generally as follows:

- (a) rates are essentially a local problem;
- (b) rate-fixing is a function of the Pilotage Authority of each District;
- (c) the Pilotage Authority is no longer unbiased and independent in the exercise of that function.

Essentially the value of each item of pilotage is determined, as is the service itself, by local circumstances and the peculiarities of each District. Hence, the wide variation from one District to another precludes adopting a general tariff applicable to all Districts.

Since the Authority who fixes the tariff must be fully acquainted with the nature and circumstances of each particular aspect of pilotage performed in the locality concerned, it is logical that this function should be performed by the Pilotage Authority of each District. Furthermore each Authority needs this power to ensure the necessary gross earnings in the District to enable it to meet its increased operating expenses and to pay the pilots an adequate income.

The fact that the Pilotage Authority is no longer disinterested as in the past is not a bar to the exercise of this function, provided that measures of control are provided in the Act to prevent abuses. Such measures could take the form of making the Pilotage Authority's decisions subject to appeal in certain defined circumstances but the principal control should be the establishment of criteria binding upon the Authority.

It was no doubt because fully controlled pilotage existed only in the Quebec District through the device of the Quebec Pilots Corporation that the 1873 Pilotage Act established criteria for fixing pilotage rates in the District of Quebec only. The relevant portion of sec. 18 subsec. (8) (corresponding to subsec. 329(h) of the present Act) reads:

"Provided always that the rates of pilotage for and below the Harbour of Quebec set forth in Tables—one and two of Schedule A. . . (of the Trinity House Act). . . shall not be altered for three years after the commencement of this Act; nor then, unless the share of the net income of the Corporation of Pilots For and Below the Harbour of Quebec annually accruing to each member of the said Corporation acting and practising as a pilot for and below the Harbour of Quebec, has been less

than six hundred dollars on an average of the said three years; in which case it shall be the duty of the Trinity House of Quebec to submit to the Governor in Council for approval, a by-law establishing such increased rates of pilotage, or pilotage dues as may be deemed necessary for the purpose of securing to each such pilot an average annual share of not less than six hundred dollars of such net income, and so on for and during each successive period of three years thereafter."

These rules were retained in the 1886 consolidation of the Act (subsec. 15(g)). In the 1906 Canada Shipping Act these specific stipulations for the Quebec District took the form of a separate section (sec. 434) to which a reference was made in subsec. 433(h). It was undoubtedly because the Quebec Pilots Corporation controlled the pilots' earnings and because it was intended these pilots should revert to their pre-1860 status of free entrepreneurs that these criteria for fixing rates were not reproduced in the 1927 consolidation of the Canada Shipping Act, although they had not been abrogated by any special legislation.

(a) One Possible Solution

The problem can be largely solved if the pilots' earnings are not dependent on the tariff because if the pilots are not concerned with rate-fixing they avoid a constant source of conflict with the shipping interests. This situation exists only when the pilots are paid a salary which is not affected by what the shipping interests have to pay for the use and the maintenance of the service. Of course labour-management problems are created but this system appears the most logical in places where the interest of the public is highly involved and where the service can not expect to be financially self-supporting.

(b) Pilots' Objections to Status of Employees

The facts indicate that although the pilots object to being called employees, they acquiesce in being treated as employees, which, as seen earlier, is what they actually are in all the main Districts. Their principal objection to a fixed salary is that it takes away the incentive to make more money by working harder. Whether the prevailing pooling arrangement is complete as in B.C., New Westminster and Saint John, N.B., or partial as in the St. Lawrence Districts (where only the value of the pilotage trip is pooled but the possibility of increasing one's income is limited by despatching rules designed to provide equal opportunities for all), its only advantage over a fixed salary is that the pilots receive a temporary increase of pay if the workload increases. The increase is temporary because if the increased workload proves to be permanent in character, it will be corrected by an increase in the number of pilots. The pilots gain another advantage from the increase in the size of the ships as a result of the way the rules for computing

the rates are set out in the tariff. However such increases are problematic: during the past decade, generally speaking (contrary to what might have been expected) the ships being piloted have increased both in size and in number. This was no doubt due to the continuing economic expansion of Canada; otherwise the advent of larger ships would have resulted in a repetition of what happened when sailing ships were gradually replaced by larger, faster steamships: all Districts soon experienced an excess of pilots who shared smaller pilotage revenues.

Most pilots are prepared to accept the fixed salary system which guarantees income plus other fringe benefits if the future of their District becomes uncertain. No doubt, this was one of the reasons why the Sydney, N.S., pilots opted in 1966 to become Crown employees. The Crown, however, should not make such an offer unless it is warranted by superior interests, that is, if it is necessary for the economy of the country to maintain an adequate and efficient pilotage service in the locality concerned. If these superior interests do not exist, the District should be abrogated or, at least, it should be recognized that the service is maintained purely for the private benefit of the shipping interests.

It appears that the pilots' objections to receiving some form of salary can be overcome. For instance, the President of the B.C. pilots did not reject the idea; he considered it was merely a matter of discussing and resolving the amount of remuneration and working conditions. The New Westminster pilots informed this Commission that they would consider receiving a fixed salary provided such a proposal was made to them. It is immaterial to them where the money comes from provided they are given adequate remuneration for their workload. A fixed salary may not always be the answer to the problem because the workload and the working conditions of pilots constantly vary; it may be that the best solution is a fixed, guaranteed remuneration for a basic workload with additional remuneration if pilots are called upon to work longer hours or in abnormal conditions.

(c) Criteria in Foreign Pilotage Legislation

Of the foreign legislation consulted only two establish criteria for fixing pilotage dues, i.e., the Pilotage Laws of Germany and of the State of California, U.S.A.

The German Pilotage Act is federal legislation of general application. The pilotage organization is controlled by the Federal Department of Transport which, *inter alia*, is responsible for fixing all pilotage dues. Depending upon the areas, pilotage service is provided (a) by the Federal state through pilots who are Federal employees, (b) by pilots' Corporations through their united pilots and (c) by certified pilots acting as free entrepreneurs outside Pilotage Districts. Except where the service is provided by state pilots the tariff is divided in two parts: the pilotage expenses that belong to the Federal

state and the remuneration for the pilots' services that are payable to the pilots' Corporations, or to the individual pilots in unorganized areas. Sec. 7 establishes the criteria for fixing the tariff as follows (the second part of the section does not apply where the pilots are government employees):

(*Translation*) "Sec. 7. When pilotage rates are fixed consideration must be given to public interest, shipping requirements and meeting public expenses incurred in providing the service. When the remuneration of the pilots is fixed, care should be taken to ensure that they receive an income commensurate with the training and responsibility of their profession and that adequate provision is made for old age, incapacity and death." (Ex. 877).

The German legislation does not provide any subsidy for pilotage services performed either in Districts operated by the pilots' Corporations or outside organized Districts. However, the Federal state is responsible for pilotage installations and equipment, the cost of which, as well as all other pilotage costs incurred by the state, are reimbursed from the first part of the pilotage dues.

The California legislation is more explicit on the subject of criteria. The rates are fixed by the legislature on advice received from a Pilotage Rate Committee which it has established. This Committee must hold public hearings biennially for the purpose of obtaining information relating to pilotage rates. In preparing its recommendations the Committee must give consideration to all relevant factors including the following:

- "(1) the costs to the pilots, individually or jointly, of providing pilot service as required;
 - (2) a net return to the pilots sufficient to attract and hold persons capable of performing this service with safety to the public and protection to the property of persons using the service; and the relationship of that income to any changes in cost of living indices;
 - (3) pilotage rates charged for comparable services rendered in other ports and harbours in the United States;
 - (4) additional factors affecting income to pilots such as the volume of shipping traffic using pilotage, change in the size or structure of vessels affecting pilotage rates, numbers of pilots available to perform services, income paid for comparable services, and other factors of related nature."
- (Ex. 879, Harbours and Navigation Code of the State of California—sec. 1211.)

To appreciate the importance of this foreign legislation the context must be understood. Since the diversity of situations met in Canada does not exist in California its legislation is of the *ad hoc* type, i.e., of a local character. In Germany, however, the overall situation is more analogous. While a variety of situations is reflected in the law, all their navigable waters border on heavily populated areas, so that there is a continuing demand for pilotage, although in varying degrees. The German service is administered by the state only when and where the pilots are employees of the Federal state. In other organized areas administration is entrusted to the Pilots' Corporations under a limited form of state control. In non-organized areas the free enterprise system prevails with the state acting as licensing authority.

4. *Rate-fixing Process*

In Canada, as seen earlier, except in a few small Commission Districts, pilotage is now, in fact, provided and managed by the state and the pilots are, in practice, employees. In these circumstances much more has to be taken into consideration than the face value of a given service. If pilotage must be maintained in the public interest, establishing the rates becomes an involved process: first, the expected total cost of the service must be established, second, what part of the total is to be collected from the shipping interests must be determined, and finally, the rates must be fixed at a realistic figure which will provide enough pilotage dues to cover the shipowners' share of the total cost.

Determining the expected total cost of the service in a District requires:

1. an estimate of the number, size and type of ships requiring pilots over a given period, together with the various kinds of pilotage service that may be required;
2. the working conditions of the individual pilot, including the maximum workload he should be expected to carry under normal circumstances and his periods of rest and leave;
3. the number of pilots needed to meet demands during expected peak periods of reasonable duration;
4. a target income for the individual pilots;
5. the amount required to meet the other operating expenses of the District.

As a rule the users of a service should bear all the costs. This is not always feasible and revenue from other sources may have to be provided if the service is to be maintained. At present, in pilotage this outside assistance which, as seen in the previous chapter, takes the form of direct or indirect subsidies from public funds is not foreseen in the Act because the pilotage service is considered merely a private service to shipping; Part VI does not provide for a central authority and each District is a separate, independent, autonomous unit which can not continue unless it obtains from the users of the service the necessary revenue to meet all costs.

The share the shipping interests should pay in a given District is determined by evaluating the maximum cost of each type of service performed and by computing the aggregate revenue they are expected to produce. Many factors must be considered when ascertaining maximum rates, *inter alia*, (a) the expected demand for each type of service; (b) the pilotage rates charged for comparable services in other Districts; (c) at what level the rates can be fixed without prejudicing the economy of the region, observing that the aim may be defeated if rates are so high that, when combined with other charges, they have the effect of reducing trade and, hence, pilotage

income. These maximum rates indicate whether the District will be self-supporting and, if not, what extra money should be obtained from other sources. Therefore, wherever a District is self-supporting shipowners must pay all expenses and if a District is not self-supporting, the charges are determined by the amount of outside financial help the Pilotage Authority can obtain.

These maximum rates also indicate whether a District could contribute toward supporting the service elsewhere in Canada. If the aggregate maximum revenue a District could produce is in excess of its total costs, the surplus might be used to support pilotage elsewhere in place of subsidies from public funds. In a country where pilotage is considered a necessary service the most favoured region with its frequent and continuing demands for pilots should be required to contribute, through a co-ordinating central authority, to the upkeep of essential pilotage services in less favoured regions. However, existing legislation does not permit the implementation of such a contribution.

Once the shipowners' total cost is determined, a charge should be fixed for each type of pilotage service so that the total dues are sufficient to ensure that the shipping interests pay their full share.

(a) Target Income and Pilots' Objections

When total costs are being computed, target income has been found to cause most difficulties. The pilots in the main Districts have always refused to consider target income as a factor that enters into rate-fixing. The 1961 negotiation meeting held in Montreal was deadlocked on the question of tariff because the shipping representatives wanted to discuss a target income while the pilots insisted that, since they are free entrepreneurs, only the value of the services they render could be considered and hence the aggregate revenue each pilot could earn during a given year was totally irrelevant. The B.C. pilots took the same attitude when the B.C. Pilotage Authority tried to obtain workload data and refused to co-operate on the ground that, being private contractors, the time they spent on duty concerned only themselves.

In theory, the pilots were right but, in fact, they were not. Their attitude would have been right if they had still been exercising their profession under the free enterprise competitive system but since they have become *de facto* employees (in that outstanding competence and personal reputation are no longer factors affecting their income, they have been relieved of their personal financial liability for accidents, their workload is equitably distributed and all earnings are pooled and shared equally), the question of annual income is now the main factor to be considered when rates are established.

Both the Shipping Federation of Canada and the Federation of the St. Lawrence Pilots made recommendations on this subject. The Shipping Federation's recommendation is based on retaining the relationship between pilotage dues and pilots' remuneration. It has advocated that the pilotage

rates and tariffs be fixed to provide sufficient revenue to cover the cost of the pilotage service including the remuneration of pilots computed on the basis of minimum/maximum yearly earnings as set by a central board of pilotage.

The St. Lawrence Pilots Federation, which advocates delegating the administration of the service to pilots' own organizations in Districts, also recommends retention of the relationship between pilotage dues and pilots' remuneration. They suggest dividing the dues in two parts, one for administration, the other for the remuneration of the pilots as in the German system. As for criteria they recommend that the service in any given District be self-supporting and that the rates for administrative purposes be established at a level which permits the payment of all administrative costs, any surplus in this category should be applied to reducing the tariff. The rates for pilotage, i.e., the remuneration of pilots, should be governed by the public interest, the value of the services rendered, the cost to the shipowners, and the necessity of attracting to the pilotage profession the finest candidates the maritime world can offer. The first recommendation of the New Westminster pilots concerns what they consider should be their minimum target income (Ex. 169):

"Pilots should receive earnings comparable at least to the highest paid Master using their services."

A target income does not, however, apply everywhere, e.g., small ports in the Atlantic provinces where pilotage is not a full time occupation or harbours like Churchill where the season is very short.

But target income is the main factor where pilotage provides full time employment for all or most of the year. It becomes more important wherever the service is not financially self-supporting and has to rely on funds from sources other than pilotage dues earned in the District.

In fact, the target income concept has been the basis of tariff discussion on the B.C. coast, and has even been the unavowed aim of the pilots in the St. Lawrence Districts. For instance, the litigation in 1960 in the Quebec District was not over the amount to be charged for a basic voyage but the recovery of the \$65,000 annual earnings lost by the pilots when the special service pilot system was abolished. It has also been the conscious or unconscious cause of the reaction of the pilots to any decrease in their annual income when a peak was attained through overwork and their workload was subsequently reduced by an increase in the number of pilots. This situation has usually been followed by a demand for an increase in dues to maintain the pilots' yearly income at the new level.

But the pilots have always declined, or neglected, to define what they judged an adequate annual remuneration. In 1962, the Treasury Board considered that the pilots of certain Districts like Quebec, Montreal, Saint John, N.B., and British Columbia were in receipt of annual revenues that were more than adequate and recommended, therefore, that Government

financial aid to these Districts should be partly or totally discontinued. But an "adequate income" for a pilot in a given District was not defined. An arbitrary figure was set (for instance for the Quebec District it was \$14,000) which, it was realized, the shipowners would consider too high and the pilots too low. The main purpose of fixing an amount was to initiate discussions and negotiations.

In the B.C. District, the Pilotage Authority had a rule it tried to follow based on the supply and demand principle with some adjustments in order to ensure that candidates with high qualifications were obtained. It is the easiest and most equitable rule when it applies. In Districts like British Columbia where pilot candidates are available the target income is the income which, combined with given working conditions and other advantages that accompany the pilots' profession, will be interesting enough to attract the best qualified potential pilots and at the same time will prove sufficient to relieve them of the temptation to abandon the exercise of the profession after they have been licensed.

But this situation does not prevail everywhere in Canada. In many Districts, like the St. Lawrence Districts, trained candidates are not immediately available and it is necessary to resort to the apprenticeship system which is generally long and elaborate. These pilots are in an inferior bargaining position because they have few reasonable alternatives to pilotage if they are not satisfied with their working conditions and earnings. After joining the pilotage service as an apprentice and spending the better part of their lives in it, their principal knowledge and experience are limited to the art of navigating in their own Districts. Hence, if they decide to retire from pilotage there are very few employment opportunities for which they qualify. Unfair advantage should not be taken of their situation.

(b) Prevailing Remuneration

In such cases the criterion for a reasonable income has been what may be termed "prevailing remuneration", i.e., the remuneration that obtains for similar work under similar conditions in comparable regions. Reference is made to the McDonald, Currie & Co. study (Appendix IX to Part I) regarding the income derived by pilots in the various Districts and for comparison with the income of some other professions, especially paras. 34-54.

The main objection of the shipping interests to the request of the Quebec pilots that the official tariff should be adjusted to compensate for the \$65,000 loss referred to above was not that the request was illogical (the preceding year the shipowners had agreed to a similar readjustment for the Montreal pilots) but that an increase in tariff would make the official income of the Quebec pilots disproportionately high compared to the Montreal and Cornwall pilots; under the prevailing remuneration principle, demands for increase in these Districts were bound to follow.

(c) *Statistics*

Although the principle of prevailing remuneration has been accepted, at least tacitly, by all concerned, in practice it has caused considerable disagreement. If the concept is to be practicable (i.e., similar income for similar workload, working conditions, responsibilities and risks), a system must be devised to overcome the difficulty of comparing the nature and circumstances of a service which varies markedly from District to District.

For this purpose statistics are necessary but they are useless and misleading unless they are well defined. Only those computed by the same method from comparable elements are valid for comparative purposes. The more detailed they are, the more useful and informative they will be.

It is because these basic rules were not strictly adhered to that the Department of Transport's efforts in recent years to compile statistical data on workload and earnings have been a major cause of disagreement and conflict. Since the components used in their computations were not of the same nature and, therefore, were not comparable, most of their statistics have proved to be misleading.

(i) "*Effective pilot*" Statistics. The number of effective pilots is defined by the Department of Transport as the "number of pilots either available daily for assignment to duty or on regular annual leave but does not include any pilot who is not available for assignment to duty because of sickness, special leave or any other reason" (Ex. 1307). Such a formula could not be applied to the pilots in the St. Lawrence Districts because it would not do them justice. This statistical concept is applicable only where the pilots, as far as distribution of workload is concerned, are considered employees, i.e., their remuneration is based on the time they are available for duty and a system of leave with pay is in effect. Such a situation prevails in all the main Districts except those on the St. Lawrence for the very good reason, as seen earlier, that in these three Districts the Pilotage Authority has deliberately refrained from pooling the pilots' earnings and has considered the pilots independent free entrepreneurs.

When the rules followed in other Districts to compute "effective pilot" statistics are applied in the St. Lawrence Districts the following irrelevancies, *inter alia*, appear:

- (a) to be counted as one effective pilot a Quebec District pilot is not allowed to take any leave while a B.C. pilot who has been on leave 120 days a year is still counted as one effective pilot;
- (b) the Quebec pilot who, according to the system prevailing in the St. Lawrence Districts for sharing the workload, has performed the maximum share permissible in a given year, is not entered as one effective pilot, if, as is permissible under the District despatching rules, he has occasionally been off the list at his own request but

has afterwards made up his lost turns. In the other Districts a pilot who has been absent (except on official leave) can not compensate for lost time by doing extra duty.

(ii) *Workload Statistics.* The workload statistics have been most misleading because they are oversimplified to the point that they become almost meaningless. They are usually based on the time spent by pilots actually piloting on board ships. While in the port type Pilotage Districts this accounts for most of the time devoted by a pilot to pilotage, in river and coastal Districts it represents only a fraction of the time a pilot is kept away from his home on pilotage duty. Statistics of this nature show these pilots at a marked disadvantage because they underestimate their working conditions and their actual workload.

Ever since these statistical figures were first provided in 1959 they have been relied upon both by the Pilotage Authority and the shipping interests but have been bitterly denounced by the pilots.

In 1960, 45 Quebec pilots spent most of their winter compiling their own figures in order to be in a position to show the exact situation in future negotiations. They arrived at different figures for workload, effective pilots and average yearly income. For instance, they found the daily average of duty was 9 hours instead of 6 hours shown by D.O.T. statistics. On the other hand their figure for average annual earnings per pilot was much lower. However, their efforts were unsuccessful for they failed to convince the Departmental officials concerned that the Departmental statistics were basically wrong and they retained the impression that the Departmental officials were not acting in good faith and were trying to convey a false idea of the pilots' work hours and remuneration. In the circumstances, negotiations based on such controversial data were bound to fail. No solution has yet been arrived at.

(iii) *Average Figures.* Average figures may also be very misleading in a service where the demand is not spread equally throughout the year. The number of pilots in a given District should be those needed to meet the demand in expected peak periods of reasonable duration. For instance, in the District of Saint John, N.B., most ships requiring pilots call during the winter months and pilots must be available in sufficient numbers to meet the demand then, with the result that there is a surplus of pilots the rest of the year. Under these circumstances a daily average workload figure calculated on a yearly basis is meaningless. If a certain number of pilots is required for a certain period, the aggregate time they are actually performing pilotage during a year is not a criterion. The questions to be decided are: (i) whether they have to be available at all times, (ii) whether their employment is on a part time basis (as in Churchill), (iii) whether, despite relatively slack periods, they must be employed on a permanent basis.

All these statistical data are worthless if taken at face value; they have to be read with reservations and when comparisons are made to arrive at the prevailing remuneration figure for a given District, their full local context must be taken into consideration.

(For further details, reference is made to those parts of this Report dealing with each District where these questions are fully studied in the light of local peculiarities and where the value and meaning of these statistics are appraised.)

5. Tariff

Once the share of the cost to be borne by shipping is established the next step is to convert this amount into tariff, i.e., into rates that will yield the required amount of revenue. It is not an easy task because there are different types of pilotage services, varying in scope, importance and circumstances for which there should be different rates.

There are three main considerations involved in this process:

- (i) the general rules which define the extent and limitations of the discretionary power of the Pilotage Authority to fix rates;
- (ii) the factors to be considered when assessing the value of a given service in a particular District;
- (iii) the various forms of expressing rates in the tariff.

(a) General rules

The Canada Shipping Act (subsec. (h) of sec. 329) gives full discretion to the Pilotage Authority, but this discretion should not be mistaken for an arbitrary power. As indicated earlier, when the Pilotage Authority fixes rates it should be guided by the interests of the public, the pilotage service and the parties involved. A tariff that results from arbitrary action is illegal. Based on the clear intent of the Act, the following rules can be stated:

- (i) the fixing of pilotage rates is exclusively a subject-matter of regulations;
- (ii) a specific rate must be provided in the regulations for each and every possible pilotage service a pilot may render in a given District;
- (iii) since discrimination is arbitrary, only objective criteria with a direct bearing on the value of a given service may be used;
- (iv) since rates are standard charges, they must always produce the same revenue for the same service to the same vessel;
- (v) the tariff must not differentiate in its rates between dues payable for services rendered and those payable as a result of the compulsory payment system;

- (vi) the rates to be used for the computation of dues that may become payable under the compulsory payment system must be fixed so that they are applicable whether services are rendered or not;
- (vii) the Pilotage Authority's rate-fixing power does not extend to any service performed beyond the limits of its District;
- (viii) the tariff as a whole must be logical and consistent.

As stated earlier, rate-fixing is exclusively the subject-matter of the regulation-making power of the Pilotage Authority. Therefore, all the elements necessary for computing the pilotage dues that may become owing for each and every pilotage service that pilots may render in a District must be listed in the regulations. No discretion can be left in the provisions of the tariff to anyone because, if it were, rates would no longer be fixed by regulation.

The expression "pilotage services" to which the rate-fixing power extends must not be confused with "pilot's services" which has a much wider meaning. Hence the Pilotage Authority's power does not extend over charges for other professional services that may be rendered by pilots, such as giving expert opinions not related to the actual navigation of a ship, acting as expert or assessor in court cases. For instance, the expert advice of a B.C. pilot was sought before the construction of the pontoon wharf in Harriet Harbour, Queen Charlotte Islands, in the B.C. District. The rate-fixing power extends only to pilots' services rendered to ships, in which pilotage services are performed or are directly related to the performance of pilotage services.

Because rate-fixing is the exclusive legislative prerogative of the Pilotage Authority, any private agreement between the parties involved (even with the approval of the Pilotage Authority) has no legal value even if, on account of an omission, the tariff does not provide a rate for a given service.

While the rule must be retained that price-fixing must be effected by regulation, a realistic attitude should be taken regarding cases of exception, such as services of infrequent occurrence or services that occur in quite unusual circumstances. In practice it would be improper to try to cover in the regulations all the possible and hypothetical types of pilotage service a pilot might be called upon to render, because such a process would detract from the clarity and simplicity with which tariffs should be constructed. Furthermore, lacking basic data, the Pilotage Authority is unable to arrive at a reasoned decision and, therefore, any rates fixed in these circumstances are perforce arbitrary. The question is further complicated by the fact that when a Pilotage Authority fixes rates it exercises a delegated legislative power whose terms do not permit retroactivity. Therefore, if a case of exception for which no rate is provided occurs, it is too late to pass a covering regulation. For this reason it is considered this shortcoming should be corrected in future legislation. While the present system should be retained as the general rule, there should be provision for a procedure to fix an *ad hoc* rate in

exceptional cases. The indicated procedure is for a superior authority to be named in the legislation to act in a quasi-judicial fashion to fix a price unless an agreement can be reached between the parties immediately interested, i.e., the shipping interests and the Pilotage Authority, or the pilot concerned if the dues are to be paid directly to him, in which case the Pilotage Authority's approval should be required.

The Pilotage Authority must not discriminate against any user or group of users. Discrimination is an abuse and hence has no place in the exercise of a discretionary power. Therefore, different rates can not be fixed on the basis of flag of register or the identity or nationality of owners, or the type of voyage in which a vessel is engaged, that is, inland-waters, home-trade, coastal or ocean-going. These factors have no bearing on the value of the services rendered. If it was desired to provide different tariffs based on such criteria, specific authority should have been given in those provisions of the Act dealing with delegation of powers, such as was done for exemptions from the compulsory payment system (secs. 346 and 347). In the various tariffs now in force there is only one such case: it refers to movages in the Harbour of Montreal and provides a lower rate for movages of inland-water vessels (Montreal By-law, Schedule A, subsec. 5(1)). In this connection, the Federation of the St. Lawrence Pilots in its recommendations (Recommendation 20, Ex. 671) urged that:

"All discrimination in the tariff in favour of coastal or inland-water vessels must be removed."

Only objective criteria with a direct bearing on the value of the services of the pilot should be taken into consideration. These will be studied later.

The tariff should always produce the same revenue for similar services rendered in similar circumstances. Since the rates are computation rules of general application, it should be possible to ascertain beforehand the exact amount any particular service costs; no part of the calculation should be left to chance. This problem arises mainly with regard to travelling expenses when, through no fault of a vessel, no pilot is available at a regular boarding station.

The availability or otherwise of a pilot at an official boarding station should never be the concern of a Master or agent. This is an internal problem of service organization and no vessel should be penalized by being required to pay higher dues than other vessels on that account. Although this question is of general concern in all Pilotage Districts, it is more pressing in river and coastal Districts which cover large areas. It also has a certain significance in harbour type Districts because ships are not always berthed close to the pilot station, with the result that the pilots often have to travel by land to board ships proceeding out of a harbour, or to return to the pilot station after disembarking. In river type Districts, e.g. on the St. Lawrence River, the flow of traffic is not equally divided in a given period of time into

upbound and downbound ships and hence, at times, the number of pilots increases at one end of the District while a shortage develops at the other end. This is an organizational problem which is met by despatching the required number of pilots by the most convenient means to the station where a shortage exists. The costs of this transportation as well as travelling expenses from shore to pilot stations, and vice versa, are foreseeable operational costs. Whether a pilot has to travel by land and incurs additional expenses in order to service a given ship should not affect the pilotage dues the ship is required to pay. These occasional travelling costs should be taken into consideration when the tariff is drawn up and divided equally among all users.

In early legislation, pilots who were not engaged in piloting, or whose services had not been retained, were not allowed to remain at an inland station. They had to return at their own expense to the seaward boarding station where they had to keep cruising throughout the boarding area in order to be available whenever vessels arrived. Nowadays, advance notice of requirements by radio makes it possible to limit the number of pilots at the seaward boarding station to those necessary to meet the expected demand and thus to improve the pilots' lot by allowing them to remain with their families until they are required. Under these circumstances, any extra operational expenses are amply justified. However, these expenses should not be met by a few chance ships but, together with other costs, should be shared equally by all potential users through the fixing of rates that will provide the revenue the District requires. The fact that there may be a number of possible boarding areas or embarking and disembarking points in a District should not alter the situation: how the demand will be met at these various places remains a matter of internal organization.

Such random charges violate another basic rule in that they can not be levied when no pilot is requested in compulsory payment Districts.

Exception should be made to this rule when the responsibility for the non-availability of a pilot can be attributed to a ship, for instance, if the ship does not meet its ETA, or fails to comply with ETA requirements, or when passing an official boarding station refuses, or does not ask for a pilot, and later while en route orders one. In these cases, any additional costs that would not have normally been incurred if the ship had complied with the rules should be chargeable. Future legislation should provide for this situation which is not covered in the existing Act.

The Quebec pilots are often faced with this problem. Occasionally, they all have to travel by land between the boarding stations in Quebec and Les Escoumains and from either one to any embarkation point in the District, mostly to Port Alfred or Chicoutimi and vice versa. When such a trip is necessary the charge to the ship does not include pilots' travelling expenses. This is the proper procedure because these costs were taken into considera-

tion when the rates were originally fixed. In the Quebec District, the individual pilots are not reimbursed probably because the pilots, who do their own pooling, consider that over a period of time these expenses will average out. In many Districts where pooling is operated by the Pilotage Authority, travelling costs are considered operating expenses of the District and are reimbursed to the pilot concerned from pilotage revenues before the pool is shared.

Two by-laws violate general rule (iv) (and also general rule (v)) as seen in the following paragraph:

- (a) In British Columbia, sec. 11 of the tariff makes payable, in addition to the normal pilotage dues, "travelling and other expenses necessarily incurred" by a pilot embarking or disembarking in the northern region or when ordered from his base to a port in either region solely for a move. Sec. 3 makes payable while aboard a pleasure yacht "the amount of any expenses necessarily incurred by the pilot during his absence from his base", in addition to the *per diem* rate provided for such pilotage service.
- (b) In the Montreal District, subsec. 5(2) provides two rates for moves in ports other than Montreal Harbour depending upon whether a pilot is available locally or not.

The existence of the compulsory system in a given District must have no bearing on the question of fixing rates except in the way the rates are defined in the regulations. The tariff is nothing more than a list of prices for the pilotage services that may be rendered. The amount owing, when compulsory payment applies, is dealt with by the Act itself. For navigation and moves of non-exempt vessels the charge is the amount of pilotage dues that would have been payable if a pilot had been employed (secs. 345 and 357). For failure to take a pilot a lesser charge may be imposed only on vessels exempted under sec. 346, in which case it amounts to a partial withdrawal of the exemption. A good example of this situation is the tariff in Port aux Basques. If no pilot is taken, normally exempted vessels are required to pay one-fifth of the normal dues if a ferry, and two-thirds if any other steamship. (Vide Port aux Basques By-law, Schedule 2.) Another example is subsec. 6(2) of the Quebec District By-law wherein the exemption granted in subsec. 346(e) C.S.A. is partly withdrawn on the basis of tonnage combined with type of voyage.

(b) *Factors determining the Value of a Service*

Rate-fixing is governed by the following factors:

- (i) the aggregate revenue the various items of tariff should yield;
- (ii) the difference in objective value between different types of service;
- (iii) the variation in value of a given service according to the circumstances in which it is performed.

As seen earlier, the amount the tariff should yield depends on whether the pilotage service in the District is fully controlled by the Pilotage Authority or whether the pilots are self-employed, operating under the free enterprise system. In the latter case the tariff should reflect the true value of the pilot's services, but where provision of the service is controlled, the amount of revenue required is determined by the total cost of the service; this amount is then spread over all the users by the establishment of rates. If the service can not be financially self-supporting, the share of the total cost that is to be borne by shipping is pro-rated. Normally, the established prices should not be higher than the objective true value of the services performed.

The rates for various types of service must also show the difference that exists between the value of one compared to another (general rule (vi)). For instance, except under special circumstances it would be an abuse of power amounting to illegality to fix a higher rate for a movage from an anchorage to a given wharf than for a full pilotage trip which was completed by berthing at the same wharf. The value of each different type of service should, *mutatis mutandis*, be based on the same criteria.

Although there are a number of different types of pilotage service that can be rendered, this causes little difficulty in practice due to the fact that the incidence of services other than pilotage trips and movages is minimal. For instance, in the Quebec District in 1962, pilotage trips (tonnage, draught, tonnage overcharge and Class A charge) provided 95 per cent of the gross revenue of the District. The next item was the remuneration of the second pilot on winter assignments, 2.6 per cent. Movages accounted for only 1.5 per cent, detentions 0.35 per cent and cancellations 0.02 per cent. However, there are special situations which have to be taken into account, e.g., in 1962, because of the physical peculiarities of the British Columbia District, combined with its considerable length and difficult land and air communications, detention and quarantine charges accounted for 11.8 per cent of the District gross earnings.

Many factors affect the actual value of each service. As far as possible, these have to be taken into consideration when the actual rates are fixed or computing rules are laid down in the regulations. These factors are mainly the following:

- (a) the nature of the service itself as qualified by the peculiarities of each District;
- (b) the difficulties attached to a "navigation unit";
- (c) the importance to the ship and cargo of the service performed;
- (d) the importance of devising a system which is as simple as possible consistent with equity so that any of the three factors listed above can be disregarded if it has a negligible effect on the final result. Efficiency will be facilitated by eliminating contentious and time-consuming calculations.

The local factor is the first in importance. The value of a service varies from place to place on account of local circumstances, e.g. the standard of training, qualifications, knowledge and skill required to navigate all types of ships in areas where known hazards exist; the cost to the District and to the pilots of maintaining and providing a pilotage service; the particular difficulties caused by special features, e.g. traversing the railway bridge in the New Westminster District, manoeuvring through the Second Narrows in Vancouver Harbour, or negotiating the Reversing Falls in Saint John, N.B., are hazards that are not met during every pilotage assignment in these Districts, but when encountered they warrant a special charge. The high degree of qualifications and training which the Saint John pilots require to conduct large vessels into Courtenay Bay, or which the Montreal River pilots must have to negotiate the narrow, tortuous channels in the St. Lawrence calls for higher remuneration than pilotage services performed where there are very few difficulties.

The difficulty involved in piloting a *navigation unit* is another pertinent factor. In the case of composite navigation units, the charge may reflect any added difficulties inherent in each type, for instance, most tariffs rightly provide for a 50 per cent surcharge (or $1\frac{1}{2}$ tariff) for the navigation of a dead ship. The difficulty of navigation varies with each type of composite unit, i.e., a tug or a number of tugs towing or pushing one or a number of barges, scows, rafts, booms or any other floating objects.

If it is practicable to assess the difficulty or otherwise of piloting various types of navigation units, there would be no objection to stipulating a smaller charge for vessels or units which, because of their type of propulsion or their steering or other devices, are fast and easy to manoeuvre, and are equipped with instruments that facilitate navigation. Conversely, a higher charge might be set for special cases which call for greater skill and caution on the pilot's part, e.g., conducting vessels with cargoes of explosives through difficult, crowded channels.

Because vessels vary greatly in type and characteristics and because pilotage rates have to be fixed by regulations, it is a practical impossibility to take into account every aspect of every situation. When the Pilotage Authority establishes the formula for computing dues it must disregard the factors of little importance and average out the effect of other known factors and of unpredictable factors that make an assignment longer, harder, or more expensive, such as weather conditions, traffic, or occasional land transportation costs.

For instance, in theory, a large vessel deeply laden should pay more for a given service than a small vessel half laden, but this may not be necessarily equitable for the pilot, because he may have a much longer and more difficult assignment with the small vessel, which is less manoeuvrable and considerably slower. On the other hand, for navigation through a tortuous,

narrow, shallow channel, it is the degree of skill and knowledge a pilot possesses that will be the determining factor whether certain ships can be safely piloted. Pilots with higher qualifications can navigate larger and more deeply laden vessels as well as a greater variety of types.

There is also a practical limit beyond which the comparative value of service should be disregarded, i.e., when the amount to be charged, taking into consideration the other charges and dues a ship has to pay, is relatively small. In such cases the resultant small differences do not warrant organizing a complex system. This explains, for instance, why most movage charges are set at a uniform flat rate.

(c) Various forms of expressing Rates in the Regulations

The Canada Shipping Act does not provide any specific basis or formula for the computation of dues. Subsec.(h) of sec. 329 merely states that the Pilotage Authority may "fix the rates, on either the same or different scales, of payments to be made in respect of pilotage dues". Subsec.(h) is not only not limitative, but it is also aimed at assuring the Pilotage Authority complete freedom to select whatever method it wishes when drawing up regulations for computing pilotage dues.

This wording was introduced in subsec.(h) when the Act was revised in 1934 in order to remove the ambiguity that resulted from deleting the reference to "pilotage dues" when the Pilotage Act was consolidated in 1886. The wording now recognizes and emphasizes the flexibility that pilotage legislation must have in Canada; different methods can be used not only in various Districts to compute pilotage dues but also in the same tariff for different types of pilotage service or components of different rates.

As must be expected, there is no uniformity between Districts in the method of computing pilotage dues and each has its own rules which, moreover, are substantially changed from time to time.

The various methods now in use may be grouped as follows:

- (a) for a particular type of pilotage a price may be fixed:
 - (i) for the service as a whole;
 - (ii) for each of the possible components;
- (b) for a complete service or for each of its components the charge may be:
 - (i) a flat, invariable amount;
 - (ii) a variable amount calculated by fixing a fee for a unit of one or a number of variable factors which depend on
 - (A) the circumstances of the trip, normally only on its length, but on occasion its duration or the ship's destination;
 - (B) the ship's characteristics, i.e., draught and/or tonnage (net or gross tonnage);

- (C) the type of navigation unit;
 - (D) any combination of (A), (B) and (C).
- (iii) a combination of both (i) and (ii), usually when either a minimum or a maximum is provided, or both.

(i) *Flat rate*. The charge for a given pilotage service may be invariable for the service as a whole or for any one of its components.

Mr. Herbert Colley, a member of the Shipping Federation of Canada and Chairman of its Pilotage Committee, made a personal recommendation during his testimony advocating adoption of the flat rate system whenever, due to the imposition of maximum and minimum rates, an average rate yielding the same aggregate revenue was not far from the minimum or maximum rate.

The Canadian Merchant Service Guild and the St. Lawrence Pilots' Federation in their briefs opposed the flat rate system claiming it is unjust both to shipowners and pilots: to the shipowners because it discriminates against small ships; to the pilots because the price for their services and the responsibility they assume should vary with the importance of the ship and its cargo. (Canadian Merchant Service Guild, Brief (Ex. 1382) paras. 35 and 36) (St. Lawrence Pilots' Federation, Brief (Ex. 671) paras. 545, 546 and 547). The argument sounds strange coming from the St. Lawrence Pilots' Federation. In the Districts of Quebec and Montreal, the fundamental question is whether the proposal is acceptable to the shipowners because they alone are concerned. The importance of a ship and her cargo means very little to the individual pilot and concerns him only remotely. Because of the special system of pooling which the pilots themselves devised, each pilot receives a flat remuneration for each trip in a given year, i.e., a uniform amount for each pilotage trip he performs irrespective of the size or draught of the ship he pilots on each occasion. The value of a pilotage trip is the result of averaging the sum of the various amounts yielded by all the trips performed by all the District pilots. (For details of the system, vide C. 6, p. 193, and Part IV, Quebec District, "Pilots' Remuneration and Tariff".)

The flat rate is a practical solution which is indicated in certain circumstances, e.g. the situation described by Mr. Colley, but the Commission does not agree that his proposal should apply to the Quebec District. Statistics show that the rates would vary materially unless it is accepted that a variation of \$50 to \$100 in the dues now being charged in the Quebec District makes little difference in the ship's aggregate cost. According to the Quebec tariff, a small ship (16 feet draught, 2,000 net registered tons) liable for the minimum charge would pay \$83.20. There is no maximum on draught but ships are not charged beyond 15,000 net registered tons. Hence, a large ship of over 15,000 N.R.T. and drawing 30 feet of water would pay \$293.50, including the \$25 Class A charge, for the basic trip from Les Escoumains to Quebec, exclusive of the pilot boat charge. According to Mr.

Colley's calculations, the average flat charge in the Quebec District for 1962 would have been \$150 thus representing an increase for all the small non-exempt vessels (liable for the minimum charge, irrespective of their size) of \$66.80—80.3%, but for the large ships a saving of \$143.50—48.9%.

The all-inclusive formula is applicable when a given service is always composed of the same components, its circumstances do not vary materially from case to case and the amount involved is either relatively small or almost constant because the few possible variations are slight. For instance, it would apply to inward and outward voyages in a harbour type District because they are always composed of two elements, the pilotage service of a pilot and the use of a pilot boat. In such a case, when both components are computed by the same method, there is no good reason for providing a separate charge for each. For example, this method was used to establish the pilotage dues in the Churchill District prior to the 1966 By-law. In 1965 the pilotage dues were \$80 all inclusive and no useful purpose was gained by splitting the charge (P.C. 1966-1623 of Aug. 24, 1966) into two flat rates, i.e. \$55 for the service of the pilot and \$25 for the pilot boat since the pilot boat always has to be used. The flat rate is the simplest way to determine charges for movages, trials, compass adjustments and for pilotage trips, when, as in most port Districts, the length and circumstances of the trip are fairly constant. A flat rate could also be charged for a component which is intended to be constant, such as a pilot boat charge, or a charge in Vancouver Harbour for transiting the Second Narrows and in New Westminster Harbour for negotiating the railway bridge.

A different factor may have militated in favour of the flat rate system in the Cornwall District (\$160 all comprehensive for a transit trip). The Cornwall District is part of the St. Lawrence Seaway system and basing pilotage dues on a flat rate had the advantage of avoiding the difficulty resulting from the lack of uniformity between the American and the Canadian systems of tonnage measurement. If the dues had been based on a variable charge depending on the size of ships, this problem would have had to be solved or Canadian upper lakers, for instance, whose gross tonnage is 10% to 13% higher than their U.S. counterparts would have had to pay a premium for transiting the District (vide pp. 168 and 168).

On the other hand a fixed charge is not indicated when:

- (1) Some of the component's situations do not always arise, e.g. the pilot boat service in the Harbour of Quebec. While a pilot vessel must always be used at Les Escoumains, one will be needed in Quebec Harbour only if a ship is not berthed. For the same reason the tariff in this example might well provide separate berthing and pilot boat charges at Quebec, because in addition to the constant factors—pilot boat charge at Les Escoumains and pilotage charge

from Les Escoumains to Quebec—there could be a requirement (unless the vessel anchored and the pilot remained aboard) for either a pilot boat or for berthing.

- (2) The same component situations always arise, but it is desired to use different methods to fix the charges for each, e.g. a flat rate for the pilot vessel and a variable rate for pilotage.

(ii) *Variable rates.* The second method is to base pilotage rates on a number of variable factors, when the extent and the circumstances of the service vary substantially and the charge is large enough to warrant consideration of these differences. The importance of making due allowance for the type of navigation unit involved was stressed earlier and need not be elaborated here. The usual method consists in fixing a price per unit of each of these variable factors.

(d) *Local variable factors*

The first group of these pertains to the circumstances of the trip, i.e., length, duration of the trip and the circumstances of the route to be followed. This last factor was studied above with the factors entering into the rate fixed for each service.

(i) *Length of the trip.* The first and most important of these variable factors is the distance covered or the length of the trip. This factor is normally not important in a port type Pilotage District where all trips are of much the same length, but it is significant in river and coastal Districts where a trip may vary from a few miles to over 100 miles in any of the three St. Lawrence Districts or up to 600 miles in the B.C. District. In river Districts a sector plan is followed because there is no choice of routes; the longest trip is divided into a number of fairly equal sections (four sections in the Districts of Quebec and Montreal) or by a natural point of destination (as in the New Westminster District, the first section is from sea to New Westminster Harbour, the second involves transiting the railway bridge and the third extends upstream into Pitt River). Because each pilotage trip in the Cornwall District is, with very few exceptions, a complete transit, a charge is provided for the full trip with the proviso that a part charge “computed on the pro rata basis according to the distance piloted” is to be made for the occasional trip that commences or terminates within the District. In the B.C. District, however, distance is charged on a mileage basis because numerous routes may be selected. The mileage system could apply equally well to river Districts but the sector system has the advantage of simplifying computations, in that each sector calls for a fraction of the basic rate while the mileage system requires fixing a rate on a mileage unit, thus bringing in an additional variable factor in the computation of the basic charge.

The distance factor does not offer any particular difficulty nor is it a source of contention. It is quite obvious that the solution can not be theoretic-

cal but must be practical and essentially dependent upon the special physical features of each District. While a charge on a mileage basis is applicable where the circumstances and difficulties of navigation alter little en route, another method should be used to assess the charge for navigating especially difficult sections that are not encountered each trip.

(ii) *Time Factor*. This factor, as a rule, is not taken into consideration because Masters try to reach their destination as quickly as possible. Occasionally, a trip takes longer due to adverse weather conditions, traffic, unavailability of berth or mechanical failures. These are considered occupational hazards that have already been compensated for because the average duration of any pilotage service is one factor that has to be taken into account by the Pilotage Authority when it fixes rates.

However, when the duration of a trip can vary considerably, either on account of its nature or because of special circumstances, the time factor may be, and usually is, taken into consideration, e.g., in winter on the St. Lawrence River a trip that normally would take about ten hours may last a number of days because of ice. For this reason, the tariffs for the District of Quebec (subsec. 3(1)(a)) and for the District of Montreal (subsec. 7(1)(a)) provide a charge, improperly called detention charge, when for any reason, including stress of weather, a winter pilotage trip is interrupted and the pilot has to stay on board. Equally, when a pilot navigates a yacht on a pleasure trip, destination is not the determining factor. In the B.C. District, where this type of service is frequent, a special tariff is based on a *per diem* charge of \$75 from base to base plus the pilot's expenses (B.C. District By-law Schedule, sec. 3). While the time element is not normally taken into account in such special assignments as compass adjusting and direction-finder calibration, because they are almost constant, it would be logical to charge for trial trips on the basis of time (B.C. District By-law Schedule, sec. 4).

(e) *Ships' characteristics*

These are also used as factors to vary charges according to the value of the service rendered. The characteristics used are normally draught or tonnage or a combination of both. Other ships' characteristics could be used, such as length, breadth, depth, deadweight and even the cargo actually carried, either singly or in any combination. Whatever method is used, the aim is to arrive at a price that would be indicative of the value of the service to the vessel.

In Canada, except in two Districts (not counting the Great Lakes Basin) where the flat rate system is adopted, each District has devised its own system for computing charges based on ships' characteristics. Aside from the prices for each unit, which varies from District to District, the rate for a pilotage trip is fixed in six Districts on net tonnage alone, in one District on draught alone, in two Districts on gross tonnage and draught, in thirteen Districts on net tonnage and draught.

A review of the pilotage legislation of 15 maritime countries shows that the ships' characteristics used in most cases to compute charges are draught and tonnage (either net or gross) taken alone or in combination, with a few exceptions:

- (a) deadweight tonnage is used in the State of Maine together with draught;
- (b) in Antwerp, Belgium, movage rates are based on the length of the ship;
- (c) for the various services they provide, including pilotage, the Panama Canal and Suez Canal Authorities have devised their own systems of measurement which are referred to as Panama Canal tonnage and Suez Canal tonnage.

In the Australian States and in West Germany, the basis is generally gross tonnage. France, Greece and New Zealand use net tonnage. Sweden uses net tonnage and mileage (distance piloted). Belgium and the Netherlands (for inland pilotage) use draught and mileage. The Netherlands (for sea pilotage) and many States in the U.S.A. base their charges on draught only.

Registered tonnage (generally referred to as net tonnage) and gross tonnage are measurements of the cubic capacity of a ship, i.e., 100 cubic feet equals 1 ton. Whereas the measurements for gross tonnage are more indicative of the size of a ship and more related to her length, breadth and depth, those for net tonnage are more indicative of a ship's earning capacity. The draught of a ship at the time it is read indicates to what extent her earning capacity is being used. As will be seen later, the tonnage indices now in force present difficulties and are not universally uniform, a situation which leaves much to be desired. This has prompted recommendations to the Commission that a special uniform method be devised to compute pilotage charges that would eliminate the difficulties now encountered with the tonnage element, as now computed, and that could be made applicable throughout Canada.

(i) *Draught factor.* The draught factor has inherent problems which have been overcome in practice.

The draught of a ship is ascertained from the Master but it can be usually verified with reasonable accuracy by any pilot.

Subsec. 340(2) C.S.A. makes it the duty of the Master to declare to the pilot the draught of his ship whenever so required, whether this is when the pilot "begins to pilot or is piloting" the ship.

The By-laws of all Districts (except Churchill) contain a similar provision which, with some slight variation in terms, reads like the Quebec District By-law subsecs. 7(1) and (2):

"7 (1) On boarding a vessel the pilot shall ascertain from the master or officer-in-charge the draught, registered tonnage and other information required to complete the pilotage card supplied by the Authority.

(2) The completed pilotage card shall be signed by the master or officer-in-charge and by the pilot and shall be delivered by the pilot to the Superintendent (or Secretary) as soon as practicable thereafter."

In the By-law of the British Columbia District (subsec. 7(1)) and New Westminster (subsec. 7(1)), the wording is the same except for "registered tonnage" which is replaced by "the net and the gross registered tonnage".

The draught figure can be read and verified by a pilot with reasonable accuracy now that all foreign ships (except fishing vessels and small vessels under 150 tons gross) are marked with load lines and have draught marks set in and painted at the bow and stern. Such reading is accurate when a vessel is in calm water but only partially so when the sea is rough or a slight swell prevails. Accurate reading is impossible then, but the reading obtained is close enough to verify the Master's figure; small errors will make little difference in the total charge.

The bow and stern draught marks are not required by any international convention. Those marks provide vital information on which a ship's safety depends, i.e., the depth of water required for safe navigation, and are, therefore, essential for all except very small vessels. On British, American and most other foreign ships, measurement markings are in feet and inches, but on French, Russian and some Japanese ships as well, the markings are in decimetres. A few foreign ships are marked in both feet and inches and decimetres. The pilots, however, are conversant with decimetre markings, for which conversion tables are used, and no difficulty or problem has ever arisen in this respect. The presence of these markings would appear to be the reason why the former provisions of the Act (sec. 452, 1927 C.S.A.), which provided a speedy procedure for settling disputes about the draught of a ship, were not reproduced in the 1934 Act. However, subsec. 340(2) C.S.A. which makes it an offence for a Master to refuse or omit to declare the correct draught of his ship, was retained. Nevertheless, the pilots have no difficulty in this regard and the Department of Transport has reported that there has been no prosecution under subsec.(2) of sec. 340, at least during the last decade (Ex. 1504).

Captain W. A. W. Catinus of the Department of Transport stated that while he was Regional Superintendent of the St. Lawrence Districts there were a few occasions when the pilot's verification differed quite materially from the Master's declaration on the pilotage card. In these instances he contacted the agents or shipowners concerned and the difference in dues was reimbursed. The explanation given was that the incorrect statements were due to errors on the part of the Masters. He added that it is not possible in practice to carry out any investigation after a ship has departed. He reported only once to Ottawa a violation of subsec. 340(2) by a Master.

A ship's draught varies while en route for a number of reasons: fuel consumption; changes in trim by altering water ballast and using water supplies; floatation differential between fresh and salt water; or because water

ballast was changed at the pilot's request for safety reasons. When under way, draught also varies on account of the hydraulic effects resulting from a ship's movement through the water. The nature and extent of these effects vary with the shape of the hull, the depth of water in narrow, shallow channels, and the speed of the ship. Ships are generally loaded to draw a little more water aft than forward for efficient handling, with the result that the bow and the stern then show different draught readings.

All Districts, except Churchill and Halifax, whether or not they make use of ship's draught as a factor in the rates, have incorporated in their By-law a definition of draught for rate purposes. It is defined as "the deepest draught of a vessel at the time pilotage services are performed". It is, therefore, the deepest draught at any moment from the time the pilot boards the ship to the moment he disembarks; it is also the deepest draught mark the ship shows whether at the bow or stern. However, the variations of draught due to the movements of a ship when under way are not taken into consideration for tariff purposes (although for the safety of the ship the pilot must take them into consideration when navigating in shallow channels) nor should there be a charge for any increase in draught made at the pilot's request.

If a fixed charge is made per foot draught, there should be a rule whether there will be a charge for a fraction of a foot and, if so, how it should be calculated.

For no known reason the method of dealing with fractions of a foot differs from District to District:

- (a) In Miramichi and Restigouche, the By-laws are silent on the matter, despite the fact that draught is used with tonnage in setting the rates.
- (b) In New Westminster (Schedule subsec. 1(2)), a fraction of less than six inches is disregarded, but if of six inches or over it is charged as a foot.
- (c) In British Columbia (Schedule subsec. 12(2)), a fraction of six inches or less is counted as half a foot, and as a foot if more than six inches.
- (d) In Saint John, N.B. (Schedule sec. 1), a fraction is not counted unless it falls exactly (sic) on the half foot mark, when half a charge is made; any fraction up to the half foot mark is disregarded while if over it is counted as a foot. This rule is adopted in the other small commission Districts, i.e., Bathurst (Schedule sec. 1), Buctouche (Schedule sec. 1), Caraquet (Schedule subsec. 1(2)), Pugwash (Schedule subsec. 1(3)), Richibucto (Schedule subsec. 1(2)), Shediac (Schedule sec. 4), Sheet Harbour (Schedule sec. 1).

- (e) In Montreal (Schedule subsec. 9(a)) and Quebec (Schedule subsec. 10(b)), the charge is per quarter foot, each fraction being counted to the next quarter.

Obviously these variations in the method of dealing with fractions of a foot draught result from lack of co-ordination and are not due to local requirements. Since draught can not be visually ascertained with accuracy in all circumstances to the inch, and since the pecuniary value of a fraction of a foot is small, it is considered that the New Westminster method (a fraction under 6 inches is disregarded but 6 inches or over is counted as a foot) is the most reasonable and most practical. It should be adopted by all Districts where the draught factor is in use.

Since the foregoing rule and the deepest draught rule are of general application wherever the draught factor is used, it is considered that they should both be enunciated in the Act itself. This would have the advantage of ensuring uniformity in legislation where there is no reason for any diversity, and also avoiding unnecessary repetition in every set of regulations where, all too often, subject-matters are not adequately covered.

Draught can be a controversial factor when used alone as a means of fixing pilotage dues but it has the marked advantages of being readily available and easily assessed, which probably explains why many large ports, such as New York, use draught alone. However, it is an arbitrary criterion which is not truly representative of either the value of the pilotage service to a pilot or to a ship, or of the extent to which a ship's earning capacity is being used.

Draught bears no relation to the size of a ship. Therefore, when taken alone as the basis of computing pilotage dues, the charge may not be truly representative of the value of the service a pilot renders, e.g. some larger ships are restricted to the draught imposed by the depth of water available in certain channels and harbours which they can enter only when light or partly loaded and hence show the same draught as much smaller ships. Draught is not necessarily the factor which determines a pilot's difficulties because, while a lightly loaded ship is normally less manoeuvrable, a deeply laden ship in a shallow, narrow channel may prove difficult to handle because of small under water clearance and the hydraulic effects caused by her movements, i.e., bank suction and squat.

It is said that draught represents the value of the cargo or, at least, the extent to which the earning capacity of a ship is being used. This can not be true of passenger vessels and would be true of cargo vessels only if all ships were constructed the same way and all carried cargoes similar in weight, volume and value. A fully laden ship will show different draught depending on the specific gravity of its cargo.

(ii) *Tonnage factor.* Tonnage represents the cubic capacity of a ship. Basically it represents a ship's true dimensions, i.e., length, breadth and depth calculated as closely as possible taking into account the variable lines and shapes of each ship.

Tonnage (gross or net) is an arbitrary unit, an index, devised to indicate the objective value of a ship or of its earning capacity for the purpose of taxation. For this reason, and also because tonnage bears no relation to ship safety, shipowners have contrived every possible device and modification in ship construction since this index was first established to incur the lowest amount of taxation without losing earning capacity. When the regulations were revised to cover new situations thus created, new stratagems were found with the result that the present tonnage measurement rules still leave much to be desired, and have become a maze of complexity.

The problem is compounded by the fact that no system of measurement is fully recognized internationally. The nations using British rules disagree as to their interpretation with the result that their tonnage figures differ.

In some parts of the world where substantial services are provided to shipping, *ad hoc* methods of measurement have been adopted to which all ships wishing to use their facilities must submit, e.g. the Suez and Panama Canals. These special indices are much more indicative of a ship's worth as far as pilotage service is concerned, but they can not be used in Canada, because only the comparatively small number of ships which were intended to transit these canals, or actually did so, have been measured on this basis.

Ships' characteristics are so diverse and change so rapidly with technological progress that in order to meet the demand for transportation, and at the same time satisfy national economic needs, it was necessary to devise a measurement unit that would both show the worth of a ship and provide a convenient yardstick for taxation purposes. Cubic capacity, referred to as tonnage, is used and provides the basis or one of the bases, on which are levied dues, charges and tolls for canals, harbours, wharves, drydocks, pilotage and other marine facilities. It also serves as a means of establishing categories of ships for the purpose of legislation concerning ships when size is one of the determining factors, e.g., in pilotage legislation it is used to determine pilotage exemptions.

The difference between gross and net tonnage is determined by deductions. According to the concept established by the 1854 United Kingdom Merchant Shipping Act, gross tonnage is the whole internal space of a ship and net tonnage is the space available to carry cargo and passengers after subtracting the non-paying spaces not available for cargo, e.g., those occupied by crew, machinery and deck houses. Gross tonnage indicates nearly

total cubic space, while net tonnage indicates a ship's earning capacity. All countries accept these principles but they do not agree on the spaces that should not be included in gross tonnage (exemptions) nor on what should be defined as deductions.

Because ships vary greatly in shape it is a very complicated task to ascertain their cubic capacity and the best practical solution is to adopt arbitrary rules to calculate tonnage (vide Appendix, Ex. 1387, for actual details of tonnage measurements of *S.S. Sept Iles*.)

While all maritime countries recognize the necessity for a uniform system of tonnage measurement, they have been unable to reach an agreement to date. This question does not convey the same sense of urgency as the load lines on which an International Agreement was reached in 1930 because load line concerns ship safety. Disagreement exists as to the accuracy and pertinence of some arbitrary rules used in the measurement formulae. The question has been under study in Great Britain for over 200 years and no completely satisfactory solution has yet been found.

The British system, originally introduced in the 1854 Act, was adopted as the basis of legislation by many countries. However, they have repeatedly modified their legislation to cover new situations without coordinating their amendments, with the consequence that measurements now vary materially from country to country.

In 1939, under the auspices of the League of Nations, the majority of the leading maritime countries drew up a set of rules known as "International Regulations for Tonnage Measurement of Ships" which were based mainly on the British rules. The war intervened but in 1947 the Governments of Belgium, Denmark, Finland, France, Iceland, the Netherlands, Norway and Sweden met at Oslo and adopted these rules which became effective June 1, 1948. Britain did not join this group and Canada also abstained because of the British Commonwealth Merchant Shipping Agreement of 1931. Since the purpose of the 1931 agreement was that the laws pertaining to shipping registry should remain the same in all Commonwealth countries, any modification to the British rules of tonnage measurement had to become law in Britain and in all the Commonwealth countries before becoming effective. Therefore, since it would be improper for Canada or any other member of the Commonwealth to make unilateral changes in tonnage regulations, the Canadian rules are the same as the British rules.

Although tonnage measurements in the countries which signed the International Agreement are governed by the same rules and, therefore, should be identical, this is not always so on account of differences of opinion between the signatories about the interpretation of some of the measurement rules. This accounts for the differences in the Norwegian and Swedish measurements of the Norwegian passenger freighter *M.S. Lyngenfjord*, which

are very slight for gross tonnage but quite material for net tonnage. These tonnage indices, shown on her registry certificate which also shows her Suez and Panama tonnages, are as follows:

	Gross	Net
Norwegian	3,791 tons	2,177 tons
Swedish	3,811 "	2,851 "
Suez Canal	5,937 "	4,529 "
Panama Canal	5,900 "	4,292 "

The United States uses neither International rules (also called Oslo rules) nor British rules. They have rules of their own which are also used by ships of Panamanian, Liberian and other flags of convenience. While there are some slight differences between British rules and International rules, there are many significant differences between British rules and United States rules. The main differences are:

- (a) Water ballast tanks. In both systems water ballast tanks situated in the double bottom are exempt and, therefore, do not count in the gross tonnage measurements. Water ballast tanks situated above the double bottom are also exempted under U.S. rules without limits but under British rules they are not exempted but are accepted as deductions from gross tonnage within limits to arrive at net tonnage.
- (b) Side tanks. They are a most important feature for Great Lakes vessels where it is common for large bulk carriers to have side ballast tanks that extend along the sides of the holds. These side tanks are not included in gross tonnage in a ship under the U.S. flag but are included if the ship is Canadian. Since large American lakers are now trading between the Lakes and ports in the Gulf of St. Lawrence, this difference affects pilotage dues in the Montreal and Quebec Districts (but not in the Cornwall District which has an invariable (flat) pilotage charge). Occasionally ocean-going ships also have side tanks, e.g., the German M.S. *Lechstein*.
- (c) Passenger cabins. Under U.S. rules any passenger cabins above the first deck which is not a complete deck to the hull are exempted for gross tonnage, but under British rules these spaces are not exempt. This difference is so significant that an American passenger vessel entering a Canadian port is required to produce an "Appendix Certificate" which shows the amount to be added to the tonnage shown on her certificate of registry to equal the tonnage under Canadian rules.

Tonnage measurement is such a problem of international concern that for a number of years it has been under active study by the Inter-governmental Maritime Consultative Organization (IMCO), a United Nations specialist agency responsible for international maritime affairs. IMCO has

proposed a solution for one tonnage problem, that is, open shelter-decks, which has now been adopted by most IMCO member countries and is on the way to adoption by the others. IMCO is aiming at a universal simplified system of tonnage measurement to cover all cases.

In Canada the two main problems concerning tonnage are:

- (a) ascertaining the British equivalent when the ship does not carry a certificate showing British measurements;
- (b) open shelter-decks.

Foreign measurements. Since the imposition of dues or other charges on shipping is a matter of taxation, the method to be used for the assessment of a ship comes within the legislative authority of Canada, failing the existence of an international agreement to which both Canada and the country of the ship's registry belong. As said earlier, Canada is bound by British rules but, whenever a ship does not carry a certificate showing its British measurements, she may be re-measured according to British rules if these measurements are necessary to assess pilotage dues or charges. The authority for this procedure is contained in sec. 100 C.S.A. A Minister's order issued pursuant to this section, dated July 31, 1956 (SOR/56-201, as amended in 1959 by SOR/50-930) (Ex. 587) lists fourteen countries² whose method of measurement differs materially from the British formula and ships registered in these countries, if not carrying a certificate of British measurement, may be re-measured in Canada. A compromise procedure has, however, been devised by the Customs Branch, Department of Revenue, and adopted by those concerned with ships' tonnage whereby an arbitrary twenty per cent is added to the tonnage shown on the tonnage certificate originating in these countries. If a ship refuses to accept the compromise procedure, she is detained for re-measurement as outlined in the Minister's order (Ex. 586). The process appears to be of doubtful legality because it is not authorized by any statutory provision and is contrary to the Minister's order. However it seems to be a valuable practical procedure which should be authorized by a relevant provision, at least in pilotage legislation. The United States of America is not among the listed countries, although Liberia and Panama, which use the American rules, are listed.

Therefore, the problems caused by different measurement systems are only practical in nature; it is merely a question of applying existing legislation.

Open shelter-deck problem. This problem is not solved under the prevailing British system of measurement. It is, in fact, an ingenious device developed to circumvent the British rules. Under British rules, only spaces permanently enclosed and available for cargo are measured for tonnage, and

² Argentina, Brazil, Chile, China, Costa Rica, Cuba, Czechoslovakia, Honduras, Liberia, Panama, Paraguay, Peru, Switzerland, Uruguay.

exemption of any space above the tonnage deck can be achieved by fitting openings (called tonnage openings) with closing appliances of a temporary nature. A shelter-deck is normally an additional deck above the tonnage deck, which is not completely enclosed and provides spaces which are not included in the tonnage measurements of the ship because they are fitted with "tonnage openings". When standard full strength hatch coamings are constructed around the tonnage openings, and other structural modifications made, the open shelter-deck becomes closed and such additional space is then added to the ship's registered gross and net tonnages. Ships so constructed and fitted when used in this open shelter-deck condition can have both gross and net tonnages some 30% less than a ship of exactly similar size and external appearance but which is not fitted with tonnage openings, or has had what might have been her open shelter-deck permanently closed.

One shipping periodical, *The Fair Play Shipping Journal*, 11 March, 1965, explained the situation as follows:

"At present, the open shelter-deck has the advantage that the shelter 'tween deck is exempt from tonnage measurement, provided that certain arrangements are incorporated in the structure. Her "tonnage opening" has to be provided on the weather deck to substantiate the fiction that the 'tween decks are "open", the bulkheads in the 'tween decks must have openings which cannot be "permanently closed" for the same reason and, as the second deck—because of these "openings"—is supposed to be at the mercy of the weather, the hatchways have to be provided with coamings 9 in. high and the scuppers from the deck to the bilges fitted with screw-down valves. All this is sheer fantasy, dating from the famous law case of 1872 when it was ruled that the upper 'tween deck of the coaster "Bear" should be exempt from tonnage measurement because it was not constructed in such a way as to protect the cargo completely".

The advantage of an open shelter-deck vessel to the shipowner lies in the additional cargo she is able to carry without the cubic space it occupies being included in the gross or net registered tonnage of the ship. In deciding whether a ship so constructed is to be modified from an open shelter-deck condition to closed or vice versa, the shipowner considers the nature of the cargo to be carried. If the cargo is heavy, such as steel, iron products and machinery, the ship may reach her load line marks before her cargo holds are full, but if the cargo is light, the holds may be full before she reaches her load line, in which case the open shelter-deck space could be used to great advantage.

To illustrate that registered tonnages of a ship vary materially between the closed and open shelter-deck conditions, the following cases were cited:

(a) *British M.V. Montcalm* (cargo vessel)

	Closed Shelter-Deck	Open Shelter-Deck	Diff. Tons	%
Gross tonnage	6,950	4,999	1,951	—28.1
Net tonnage	3,875	2,615	1,260	—32.5

(b) *British M.V. La Selva* (cargo vessel)

Gross tonnage	9,407	7,014	2,393	—25.4
Net tonnage	6,094	3,821	2,273	—37.3

There is, however, no dishonesty in the process because a ship is either in one condition or another, which can be easily ascertained: if in the closed deck condition, registered closed deck tonnage, i.e., maximum tonnage, is applicable. There is only an appearance of injustice in that the same ship may show different tonnages on different occasions, but there is no material difference if a ship's tonnage is altered by structural modifications and then remeasured. The fact that alterations can be done more easily in open shelter-deck ships does not change the basic situation. Furthermore changing from one condition to the other requires expensive structural modifications.

If such a ship was in the closed shelter-deck condition it would be a misrepresentation on the part of the Master to claim open shelter-deck tonnage.

It is worth noting here what appears to be a deficiency in the present Act: while subsec. (2) of sec. 340 makes it obligatory for Masters and owners of all ships to answer truthfully relevant questions to aid in ascertaining the correct pilotage dues, there is no punishment for contravening this provision. The only punishment provided is for misrepresentation or omissions by the Master regarding draught. It would appear, however, that the distinction was intentional for it is an obligation and duty of the Master to declare the correct draught as an important factor concerning the safety of the ship. When the question merely concerns information about fixing dues Parliament seems to have been satisfied that the question is adequately covered by civil and criminal legislation and also by the Pilotage Authority's power to enforce payment of any pilotage dues for which a ship is liable.

In their recommendation No. 20 the St. Lawrence pilots propose utilizing the maximum net or gross tonnage, as it appears in the certificate of registration, in order to cover ships with shelter-decks or side tanks. The B.C. and New Westminster pilots have already adopted maximum gross tonnage as the criterion. However, this recommendation does not go to the heart of the problem; it proposes a solution for only part of the shelter-deck question and is not the answer to the problem created by the side tanks in certain ships. It is only the "open shelter-deck/closed shelter-deck" ships that have two net and gross tonnage measurements; but the open shelter-deck ship which is never intended to be used in the closed deck condition has not been measured for the closed deck condition and her certificate of registry does not show maximum gross or net tonnages. There is no problem with side tanks under British measurements, and here the only solution is to apply Canadian law, i.e., these ships, whether they are American or other foreign registry, must be remeasured to show British measurements, unless they already carry British measurements in addition to those of their country of registry.

IMCO solution: tonnage mark. The IMCO tonnage mark system has been approved by all members and will become effective as an international agreement when it is adopted by all member countries. Some have already included the agreement in their legislation—United Kingdom, U.S.A., U.S.S.R. and others—but Canada has not yet done so.

The new system will do away with tonnage openings. Ships will be allowed to have two tonnage designations despite the fact that the 'tween-deck is to be permanently constructed in the closed deck condition. The new system was described as follows in an extract from *Lloyd's Report* (Ex. 1507):

"The new system abolishes the 'temporary means of closing openings' (the class 2 closing appliance of the Loadline Rules) in bulkheads and deck as a condition for exemption of the spaces to which the openings give access. Thus, the open shelter deck ship will disappear, and with it the open shelter deck/closed shelter deck (OSD/CSD) convertible type".

"The two deck ship of the future, if it is designed for maximum deadweight, will have two tonnages but only one freeboard assigned; the greater tonnage will include in the measurement all spaces below the weather deck, which will also be the deck from which the freeboard will be assigned, whilst the smaller tonnage will include in the measurement all spaces below the second deck only, the 'tween deck spaces being exempt even although they are without tonnage openings. A new special tonnage mark, to be set off from the second deck, will be assigned by the Tonnage Authority and will be cut in on the ship's sides. So long as this special tonnage mark is not submerged, the smaller tonnage will be the tonnage of the ship; if it is submerged, the greater tonnage will be the tonnage of the ship. Thus draught will control tonnage directly."

Gross or net tonnage. Is gross or net tonnage a better basis for computing pilotage dues? The answer depends primarily on whether the dues are considered remuneration for a personal service or a tax on ability to pay. Gross tonnage is more indicative of the value of services rendered. Since pilotage problems increase with a ship's size, gross tonnage is more closely related to dimensions than is net tonnage. For example, irrespective of their dimensions, tugs often have no net tonnage because all their available space is used for power, crew accommodation and other services.

The District of British Columbia was the first to adopt gross tonnage as an element for fixing pilotage dues. In a 1966 By-law amendment the New Westminster District also adopted gross tonnage to replace net tonnage.

Suggestions and recommendations received. For the above reasons the tonnage index as calculated from time to time was never wholly satisfactory and there has been much criticism. All those interested have urged the responsible authorities to replace it by another method of appraising a ship's worth for assessment purposes. Much criticism arises from misunderstanding the tonnage concept. By definition it is not a method of calculating either the real value of any service a ship receives or of assessments levied for various purposes. It is only a factor that may be used to fix these prices and assessments and must be taken for no more than what it represents, i.e., the cubic carrying capacity of a ship. For instance, speaking of the value of a

pilot's services, if two ships that take pilots obviously have similar dimensions the tonnage index could readily be used, or any of the three basic dimensions. However, the problem is not that simple because the relation between dimensions varies materially from one ship to another. At times tonnage index has a marked advantage because, although it has no constant relation with any of the three dimensions taken alone, it is indicative of the only common factor ships have: cubic capacity.

This question was one of those submitted to a Departmental Committee created August 10, 1949 (P.C. 3978) under the Chairmanship of Mr. L. C. Audette to investigate the administration of pilotage in those Districts where the Minister was the Pilotage Authority. The Committee reported that they had considered the question but were unable to reach any agreement and suggested the studies be continued:

"We have endeavoured to consider the establishment of a uniform system to form the basis of tariffs in all districts. The districts are in sharp disagreement among themselves upon this subject, though none is unwilling to accept any new basis involving an increase in revenues.

We have attempted to evolve various formulae upon which we could reach firm agreement. In this we have been unsuccessful for a variety of reasons. The work involved in obtaining the necessary data upon the ships of different types entering and leaving each district, the testing of each formula by applying it to the number of ships of each description in order to ensure that the proposal caused no unfairness to any class of ships would involve such a length of time that we do not believe it would be justifiable for this Committee to remain convened for that purpose. Though our efforts to reach any measure of firm agreement have been fruitless, we feel that there would be great advantage in exploring a formula combining draft and tonnage. Our suggestion along these lines might be pursued with the advantage by the able public servants on your staff who could peruse your departmental records and extract therefrom the statistical information required. They could embark upon this lengthy task without the obvious disadvantages attendant upon the present Committee being convened for so long a time. It is our belief that if this suggestion is pursued, a tariff system along these lines might be evolved which could serve as a common basis for all districts providing some element of flexibility is introduced to prevent certain classes of ships from bearing an unfair share and others from escaping too lightly. We recommend that any conclusions reached on this score by the staff of your Department be brought to the attention of the shipping interests and of the Pilots' Committees for any constructive criticism they may be in a position to offer.

As such an undertaking has for its object the ascertainment of general principles and not the increase or decrease in the revenues of any district, we strongly urge that any proposals placed before the pilots or the shipping interests for their constructive criticism should be so adjusted in relation to the revenues resulting therefrom that they will present no change from the revenues produced by the existing tariffs. It is our belief that only in this manner could unbiased criticism be obtained. If thereafter, there is any reason for an increase or decrease in the revenues of any district, this could be done by increasing or decreasing the rates by a given percentage." (Ex. 1330, pp. 18-20).

The Shipping Federation of Canada does not advocate any special method. They seem satisfied with whatever method of assessment is used provided it is arrived at through negotiations between the shipping industry and the other interested party (Recommendation No. 4, Ex. 726).

At the Halifax hearings (vol. 30, p. 3344) Captain A. D. Latter, District Supervisor of Pilots, stated:

"I have views on the method of tariff calculation. In other words net tonnage is becoming more unfair each year with the trend of the shipowner to dodge some tariff by either sheltered decks, special tanks, deep tanks. I think eventually the only fair way to charge ships, be it on pilotage or harbour dues, is going to be some system that is worked out on the size of the vessel, not on the tonnage, but on her length, breadth and draught, because even the larger ships now can float at a shallow draught. The charge on draught, we have deep draught ships which are using net tonnage and don't have such great tonnage. I think length, breadth and draught will eventually have to be used and a rate scale put on that. In this District it is most unfair the way some ships are skipping on pilotage because of the sheltered deck business."

At present the Halifax tariff is based on net tonnage only. The main point of contention again appears to be open shelter-deck ships. Captain Latter proposes to do away with tonnage as an index and to replace it by a formula which permits the assessment of ships on the approximate volume of water displaced when a pilotage service is rendered, i.e., the cubic measurement computed by multiplying breadth, length and draught. Alternately a system could be devised to charge for each of these three dimensions as units. At first sight neither considers the actual size of a ship.

Captain William Crook, a Halifax pilot, proposed to the Commission a system basing the unit on the approximate surface of the main deck of a ship, doing away altogether with volume, i.e., overall length multiplied by breadth divided by 50 (Ex. 1180). This formula would give ship's units for computing dues with a fixed price set for each unit. It would appear that this formula would be equitable neither to ships of various types nor to the pilots. Since ships with the same surface measurement of weather deck may well vary considerably both in tonnage and in depth, this system would not determine a fair price for services rendered because deck surface is only a remote and inconsistent indication of the difficulty of a pilotage service and its value.

Captain F. S. Slocombe, Chief, Nautical and Pilotage Division, Department of Transport, in a paper prepared for the Commission on the subject of Tonnage Measurement, September 8, 1964 (Ex. 1387), concluded as follows:

"Tonnage of a ship is affected by many arbitrary rules having no bearing upon the manoeuvrability, or the difficulty of handling a ship in pilotage waters. As long as pilots are remunerated on a fee basis, they will always find causes for dissatisfaction with individual cases of variation in tonnage.

In considering possible alternatives to tonnage as a factor in pilotage dues it is essential to remember that the prime need is simplicity. It should not be necessary to make a computation to find a factor to use in another computation; and the factor chosen should be one that is clearly shown in the ship's documents, as in tonnage, but without the possibility of variation under different national rules. Overall length would perhaps be most suitable if it were shown on registry documents, but this is not the case. There remains the register length, which is the length from the fore part of the stem to the after part of the stern post. It may be taken that the breadth of a ship will be in proportion to the length and

it should not be necessary to take this into account in computation of pilotage dues. If it were desired to substitute register length for tonnage where tonnage is now used, the procedure would be simple. All that would be necessary would be to take the sum of all the lengths in feet of ships named on pilotage source forms over a representative period of time, and divide the number of feet into the total amount paid on account of tonnage by the same ships. The result would be the amount per foot which would bring in the same amount of dues for the same traffic."

The Canadian Shipowners Association, in their brief (Ex. 1436), made the following recommendation:

"Negotiate a realistic method for the assessing and payment of fees, giving proper regard to the value of the service rendered, the need or otherwise for compulsory pilotage or compulsory payment of pilotage dues, and the impact of such costs on the Canadian economy."

Captain J. A. Heenan, the Commission's Technical Adviser, delved very thoroughly into the question and tried to formulate a simple formula that might be made applicable throughout Canada in the computation of pilotage dues (Ex. 1505). He started from the principle that "the relative ease or difficulty of a pilot's task depends more on the size of the ship than on its measured tonnage" and other criteria. He devised a formula whereby a fixed unchangeable unit is arrived at for each ship by calculating the product of its registered length, breadth and depth divided by 10,000 (to reduce a large number to a workable denominator). A Pilotage Authority, in order to fix the rates of pilotage (and any Port Authorities, if they wish to use the same method for levying their port charges) would have to fix by regulation the price for a unit which, when multiplied by the number of the fixed units of a given ship, would provide pilotage dues. The price for the unit could be varied from time to time by regulations so that the aggregate amount of the pilotage dues so arrived at would yield the part of the total cost of the service that is to be borne by shipping. He remarked, however, that such a method would be more applicable to large ships than to small ones. If the unit of a small ship (below 4,000 or 5,000 gross tons) multiplied by the unit of the District would not provide sufficient pilotage dues, a minimum pilotage fee should be established. In his paper, he tested the formula on four ships.

While the aggregate yield under the proposed formula can be made to arrive at the same amount produced by the method now in use in each District by fixing the appropriate price per unit, the resulting charges at ship's level differ materially from the present charges between ships.

The selected ships and their characteristics are as follows:

<i>Ships</i>	<i>Type</i>	<i>Length</i>	<i>Breadth</i>	<i>Depth</i>	<i>Gross Tonnage</i>	<i>Net Tonnage</i>
Empress of England	Passenger	640'	85'	29'	25,585	13,725
Severn River	General cargo	442'	57'	28'	7,158	4,378
Beaverlake	Passenger & cargo	498'	64'	30'	9,824	5,818
Invicta	Bulk carrier	576'	75'	30'	12,645	8,404

The dues for each of these ships calculated under the proposed formula (where the aggregate dues yield the same gross revenue in a given year as under the tariff now in force in those Districts) show the following differences:

	<i>Halifax</i>	<i>B.C.</i>	<i>Quebec</i>
Empress of England	— 9.5%	+11%	—10 %
Severn River	— 9.2%	+ 1%	— 9.2%
Beaverlake	+ 1.1%	— 1%	+11.6%
Invicta	+11.1%	— 9%	+ 9.4%

In these four cases the rates are based on ship characteristics. The substantial differences which result when the proposed formula is applied in the three selected Districts are caused by the fact that different ship characteristics with no mathematical relationship are used: Halifax District, net tonnage; B.C. District, gross tonnage and draught, no mileage variation; Quebec District, net tonnage and draught.

The Commission sought the advice of an outside expert, Mr. Richard Lowery, President of Davie Shipbuilding Limited, Naval Architect, whose Report appears in extenso as Appendix XI. In a learned and detailed report he exposes the short-comings of the present tonnage measurement system and studies the possibility of devising another system which would be based upon "convenience, simplicity of application and consistency of results between similar ships of any nation", and which "should result in all ships paying for services on a reasonably comparative basis". He reviews the different methods and suggestions and comes into general agreement with Captain Heenan's proposal but instead of registered depth he proposes the "depth to uppermost continuous deck" so that the cubic figure is better related to the actual size of the ship and, at the same time, takes care of the problem of open shelter-deck ships. One drawback is that depth as so defined is not shown on ships' papers and the information would have to be obtained from the Master of each ship. Mr. Lowery points out that "... it is of more importance to choose an appropriate factor which can be fairly readily obtained, than to choose an inappropriate one whose major merit is its convenience and availability." He sums up his findings as follows:

- "1. Neither Gross Tonnage nor Net Tonnage is satisfactory, but Gross Tonnage is preferable to Net.
2. Any formula using 'Registered Depth' cannot be satisfactory.
3. Any formula using 'Freeboard Depth' cannot be satisfactory.
4. A formula using 'Registered Length', 'Registered Breadth' and 'Depth to Uppermost continuous Deck' multiplied together would be fairly satisfactory providing:
 - (a) the pilotage authorities believe they could establish and enforce the 'Depth' without too much trouble,
 - (b) the dues payable could be calculated on this basis to compare reasonably in both total and individual applications with those presently in operation.

As stated many times in this report, such a parameter would by no means be perfect. I believe, however, that it would be reasonable."

He warns that the proposed formula should not be put into practice until data on the proposed depth factor have been accumulated and tested. Furthermore, he admits that the proposed units may not be the sole factor that ought to be used in computing the rates and that "in some special instances it will be only right and proper to introduce another variable based upon estimated relative time to conduct particular pilotage operations within districts where different operations require great variations of time."

(f) *Fixing the Price for Components in Composite Rates*

Since no general principles are laid down to determine the appropriate relationship between the prices charged for pilotage dues which consist of a number of units or components, the Pilotage Authority must base its decision on local requirements and general experience. For instance, in Districts like Halifax and B.C. where the depth of water is not normally a problem, draught represents only the cargo a ship is carrying or the extent to which her tonnage is being used. In such cases, one method of calculating the value of a pilotage service for a vessel and her cargo might well be to fix a gross ton unit price which, when multiplied by gross tonnage, shows the maximum pilotage dues a fully laden ship would have to pay. If the ship is not fully laden the maximum charge could be decreased in proportion to the draught not being used, e.g., a ship with a 20-foot load line but loaded to the 15-foot mark, might be required to pay only three-quarters of the maximum charge. Many other formulae could be devised.

Ever since pilotage rates have been fixed on the basis of tonnage and draught combined, the method accepted has been to set a price for each factor normally in the form of a uniform price per unit (e.g. Quebec District \$5.20 per foot draught plus three quarters of a cent per net ton). This method results in a fixed charge for each ship on tonnage and a variable charge on draught. The relationship between the charges for each component is determined by appraising the actual value of service to ships of various tonnages at various draughts and, on the basis of these data, fixing prices for each unit to represent as closely as possible the real value of a service for a given ship, i.e., the same amount that would be charged if an *ad hoc* price were fixed each time service was provided.

The situation becomes more complicated when, on account of restricted depth of water, less under water keel clearance means less manoeuvrability which increases the difficulty of an assignment and demands higher qualifications and greater skill on the part of the pilot. The simplest way to deal with such a situation is to use the gross tonnage factor alone and to provide a scale of prices for given groups of tonnage units where prices are not increased mathematically but in relation to the local pilotage difficulties that arise with an increase in size. Alternately there might be a combination of a

fixed unit price for tonnage and a variable scale of prices on draught where charges increase sharply to compensate for pilotage difficulties up to the maximum draught above which a ship can no longer be safely piloted.

When, as is generally the case nowadays, tariffs are devised to yield a required amount of gross revenue, appropriate statistical data should be gathered to show up any change in the basic pattern, e.g., a decrease in the number of ships coupled with an increase in tonnage will not necessarily yield the same aggregate revenue if most of the dues are derived from draught, as in the Quebec District. Therefore a significant change in the basic pattern should call for a revision of the unit price of each factor. In the B.C. District, for instance, the number of pilotage trips is greatly affected because it is the local practice for ships to call at as many as seven ports taking on a special type of partial cargo in each one before obtaining a full cargo of lumber. As the Commission learned at the New Westminster hearing, pilotage revenue would be substantially lower if this pattern changed. Such a change was experienced in shipments from Fraser Mills because at times it was found more economical to ship large quantities of lumber by land from New Westminster to Vancouver, where a ship was being partially loaded, than for the ship to proceed to New Westminster to collect a partial cargo as was necessary before road improvements made overland shipments economically possible.

Therefore, the special requirements of the pilotage service in each District are the essential factors in determining how the tariff is devised and what price is set for each component. Diverse methods and unit prices are to be expected from one District to another and within a given District from time to time as changes occur. For instance, in 1962 the basic charge for a pilotage trip was calculated as follows in the following Districts (the figures in brackets show the percentage of the aggregate revenue derived from each component):

<i>District</i>	<i>Per Ton</i>	<i>Per Foot Draught</i>	<i>Per Mile</i>
Quebec	$\frac{3}{4}$ c. (23.7%)	\$5.20 (76.3%)	— (0%)
New Westminster	1.3c. (52.1%)	\$2.60 (47.9%)	— (0%)
British Columbia	$\frac{1}{2}$ c. (38.3%)	\$1.00 (20.3%)	\$0.82 (41.4%)

The different use made of the same two factors in the Quebec and New Westminster Districts is difficult to explain. In the Quebec tariff the value of a pilotage service is based on the extent to which the earning capacity of a ship is being used at the time. In New Westminster, however, possibly on account of the controlling depth of the channel and also on account of the loading procedure followed on the B.C. Coast, full cargoes and deep-draught ships are not the rule but local factors are reflected in a higher charge per tonnage unit.

The differences between Districts are further emphasized when a uniform formula is applied, e.g., Captain J. A. Heenan's formula (Ex. 1505) which was analyzed earlier on pages 252 and 253.

The absence of criteria and of effective control may have resulted in erroneous calculations and tariffs prejudicial to certain ships. If these errors are significant they can be corrected on the basis of adequate studies and calculations.

Computers working with accumulated data could prepare more accurate rules for determining the value of pilotage services to a given ship at a given time in a given District, but the problem is not urgent because there appears to be no substantial injustice in any tariff now in force and no complaint on this subject was received from the shipowners.

Once the price relationship between the various components of a charge is established, an increase or a decrease in aggregate revenue can be readily effected by imposing either an overall surcharge or a general decrease in percentage (as was done during the Second World War and postwar years in most Districts, and recently, *inter alia*, in the Quebec and Montreal Districts) or by increasing or decreasing proportionately the charge for each component. However, a change in the basic trade pattern that prevailed when the rates were set makes it obligatory to reassess the whole scheme, i.e., to examine the relationship between the unit price of each component.

COMMENTS

There is no limit to the number and nature of rules that could be devised to fix pilotage rates. All formulae are legal provided they are of general application and not discriminatory and the components are directly related to the value of pilotage services.

It must be realized that it is essentially a local problem to establish pilotage charges and that the price for a given service is determined by its nature and circumstances, which vary from place to place. It would require arbitrary action to achieve uniformity in charges, or in formulae to compute charges, for services that are basically dissimilar from place to place and from time to time.

As indicated earlier in this chapter, rate-fixing is affected by a number of factors, principally the nature of the service itself, the peculiarities of each District, the difficulties inherent in each navigation unit and the importance of the service to the ship and her cargo.

When these factors are considered it is obvious that the only advantages of a standard fixed formula would be simplicity and ease of application but it would be unrealistic and arbitrary. If simplicity is the ultimate aim the flat rate system is indicated. If the rates are to be high and if responsibilities and difficulties, which vary from ship to ship and from District to District, are to

be compensated, local factors and ship's characteristics must be considered. It is agreed that ship's characteristics should indicate a ship's size because this factor has the greatest effect on pilotage services.

In the Suez Canal and the Panama Canal, where only a ship's characteristics are variable (the length of the transit is constant as are the route followed and the problems encountered), a formula based solely on ship characteristics is indicated. Since they are the only factors, any discrepancies between one ship and another have a greater effect on pilotage charges than in a system where characteristics are only one component of the computation. By adopting their own method of measuring ships the Suez and Panama Canal authorities solve any problems that might arise because of various tonnage measurement systems. Again a solution of this nature can not apply where a diversity of situations has to be contemplated but a number of localities where there is uniformity of pilotage services (like most port type Pilotage Districts) might well devise a special formula based on ship characteristics alone.

As pointed out by Mr. R. Lowery in his report, any ship unit must be a function of her three dimensions. To eliminate depth can only result in serious injustice in certain cases and an index so obtained would not indicate the true dimensions or the true size of one ship compared to another.

It is pertinent to note that the formulae proposed by Captain Heenan and Mr. Lowery are basically a tonnage measurement and that in the tonnage system the ton is also a "ship unit". For a given ship the number of tons is a fixed unchangeable number of units. If the dimensions used in the proposed formulae were (as for tonnage measurement) the average dimensions and not their maximum figures, which are true in only one aspect of a ship, then the difference between the ship unit as computed by the proposed formulae and the gross tonnage figure would be slight because the proposed ship unit would be based on the exterior dimensions of a ship while tonnage is based on inside dimensions. Therefore, the difference between the two figures would be accounted for by the volume of material that enters into a ship's construction and exempted spaces. The incidence of these exemptions in proportion to the total volume of a ship is very small, and even if they vary somewhat from one ship to another they have very little effect on the overall result.

The other difference is more significant. The simplified method of calculating the volume of ships for the purpose of arriving at ship units does not take into account the marked differences in the shape of ships, e.g. lakers and ocean-going liners are considered identical if their three dimensions happen to coincide. Because of the considerable difference in volume between ships with the same three maximum dimensions a complicated system of tonnage measurement has been devised. It is considered that to do away with the accurate figure of tonnage measurement in favour of the arbitrary

figure of ship units as proposed, because of some shortcomings in the tonnage measurement rules, may amount to an oversimplification of the problem by adopting a more arbitrary rule which is even less realistic.

The difference would be more marked in the net tonnage figure, which is not uniformly related to the true dimensions of a ship. It is considered, therefore, that the net tonnage figure should not be used to compute pilotage rates and, if tonnage is to be a criterion, gross tonnage is more equitable.

In order to arrive at an adequate ship unit from the pilotage point of view it would be necessary to calculate the actual volume of each ship according to its true dimensions, including shelter-deck and any superstructure that adds to the size of the ship and, hence, to the difficulties of pilotage. This, however, can not be done in practice because it would require a formula as complicated as the one devised for establishing tonnage, and the task of measuring volume would be so involved that it would be out of all proportion to the ultimate aim.

Gross tonnage as a ship unit has the marked advantage that it is readily available for most ships and when a certificate of registry does not record British measurements the law provides a procedure to ascertain them. Since pilotage dues form only a relatively small fraction of the total costs incurred by shipping in a given District, any special system of computing dues should be avoided unless the necessary information is readily available. A complicated system would prove contentious and time-consuming and its disadvantages would outweigh the known drawbacks of gross tonnage as a basis for calculating charges.

With regard to ship characteristics, the question is, therefore, whether a wholly Canadian system should be devised or whether the gross tonnage unit should be retained to be used either alone or with other factors. It is considered that no simple formula free from arbitrary features but, at the same time, truly representative of a ship's dimensions could be devised on the basis of accurate information now available. This problem is not peculiar to Canada but is of international concern. The Inter-governmental Maritime Consultative Organization (IMCO) is actively endeavouring to devise new universal tonnage measurement rules and if it reaches an equitable solution it is expected that the new rules will be accepted by the principal maritime countries. The result will be international uniformity in computing ship units. In the circumstances, it is considered that Canada should not try to innovate by devising its own tonnage system but, as a member of IMCO, should promote the adoption of an improved tonnage measurement system of international application. Few systems have the simplicity and the advantages of tonnage as a unit, once the index is duly corrected and universally applied.

Until IMCO has succeeded, problems should be solved at District level in the light of accurate statistics which show the nature and extent of difficulties that affect local traffic. If shortcomings in the tonnage index create

an injustice, corrective measures can be taken by assessing an appropriate surcharge for the category of ships involved. In the case of shelter-deck ships or those bearing tonnage marks under the IMCO proposal, the maximum gross tonnage should be taken, irrespective of whether the ship is in the open or closed deck situation, in order to relate the tonnage index as closely as possible to the size of the ship. When the certificate of registry shows only open shelter-deck tonnage, an arbitrary maximum tonnage should be computed by increasing the open shelter-deck tonnage by a prescribed percentage unless actual measurements are taken. Since tariffs are a subject-matter of regulations, they can easily be modified to meet any material change in the dimensions of certain ships which make the tonnage unit an inaccurate index.

The incidence of local factors and the various types of pilotage services make uniformity of rates or rate formulae impractical. For instance, distance can not be dealt with in the abstract, but ought to be considered on a practical basis, i.e., what is entailed in a given locality, e.g. transiting the Railway Bridge at New Westminster and negotiating the Second Narrows at Vancouver mean much more in terms of value of the pilotage service rendered than payment for fractions of a mile. Because these particular problems are not met in every pilotage trip, these local factors have to be specifically reflected in the tariff by providing special rates.

However, when the importance of local factors can be disregarded or when an increase in pilotage difficulties is closely related to the size of a ship, the indicated and simplest formula is a charge based on the gross tonnage unit. In the first case, the rate might take the form of a fixed price per gross tonnage unit with a fixed minimum; in the second case, it might take the form of a scale of prices for groups of gross tonnage units, the prices being related to pilotage difficulties. In addition to equity and simplicity, this method has the advantage of yielding the same aggregate revenue if many smaller ships are replaced by fewer larger ones as is the trend today.

The foregoing remarks concern pilotage trips involving a navigation unit which consists of a single, self-propelled vessel. If a navigation unit comprises a number of distinct components, ship characteristics no longer have the same comparative value. Whether or not use should be made of them is a question to be determined by reference to the various types of navigation unit that may be met in a given District. For instance, the rates for the navigation of a dead ship may be adequately assessed by a general surcharge of 50 per cent, as is now done in most Districts. Another possibility is to use as ship units the total tonnage of all the components of a navigation unit. Neither system would be adequate when a navigation unit consists of a tug with one or more barges or rafts. In that event the only solution would appear to be a special rate for special service.

6. Pilotage Dues for Services Rendered and Pilots' Remuneration

Subsec. (h) of sec. 329 C.S.A. refers to the "remuneration" of pilots in opposition to "pilotage dues". Although the Act frequently mentions pilotage dues it makes no further use of the other expression. Twice in sec. 329, subsecs. (b) and (l) (and nowhere else) the term "earnings" is used.

The use of different expressions in subsec. (h) in opposition to one another in the same sentence indicates that two distinct situations are being dealt with. When the term "pilotage dues" is replaced in subsec. (h) by its statutory equivalent (subsec. 2(70)), the "remuneration payable in respect to pilotage" is placed in opposition to the expression "remuneration of pilots".

When the question is studied in relation to the context, the reason for using the word "pilotage" instead of "pilot" to qualify remuneration in the statutory definition becomes apparent: pilotage has a wider meaning because it refers to the service as a whole.

"Pilotage dues" may be defined (a) from the ship's point of view as the price the ship has to pay for a given pilotage service, (b) from the pilot's point of view as the pecuniary consideration of a pilotage contract, i.e., the gross earnings derived for performing the services for which he was hired, including all expenses the task entailed.

However, there appears to be no difference between the terms "pilots' remuneration" and "pilots' earnings"; the two are neither contrasted nor defined. If a distinction ever existed it has no significance in the Act. The use of different terms to express the same meaning in the legislation is a drafting error which should be corrected.

"Pilots' remuneration" or "pilots' earnings" mean that portion of the pilotage dues a pilot collects, the amount which remains after two deductions are effected by the Pilotage Authority, and on which amount his compulsory contribution to the pilots' fund is calculated:

- (a) the deduction of pilot vessel earnings, which the Pilotage Authority has fixed by regulation pursuant to subsec. 329(b) as the charge for using a licensed pilot vessel;
- (b) any assessment the Pilotage Authority may make by executive order sanctioned by the Governor in Council pursuant to sec. 328 to meet the operating expenses of the District.

The second deduction was explained in the preceding chapter (vide pp. 107 and ff.). The first occurs only when a pilot does not operate his own pilot boat and licensed vessels belonging to third parties are available. The Pilotage Authority fixes by regulation the pecuniary consideration of the hire contract of the pilot vessel by the pilot which is the share of the dues earned as a result of the pilotage contract that the pilot has to pay over to the pilot vessel's owner.

“Pilot vessel earnings” should not be confused with “pilot boat charge”. The latter is a component of the price a ship has to pay for pilotage service, while the former is the price that a pilot has to pay for pilot vessel service.

While the tariff may provide for a pilot vessel charge, there may be no pilot vessel earnings fixed in the regulations, e.g. in the Prince Edward Island District. The contrary may also be true, as in the Churchill District prior to the 1966 amendment when pilotage dues consisted of a comprehensive charge while the regulations fixed the portion of that charge which was paid for the use of a pilot vessel. When both expressions are used in the regulations, the practice has been that they coincide but this need not be so. For instance, when establishing pilotage dues the Quebec Pilotage Authority may well decide that the differential will be an additional \$10 when a pilot vessel is used in Quebec Harbour, while the share of the pilot vessel is set at \$25, taking into account the fact that the pilot’s services were worth less because he did not berth the ship.

Because pilotage dues belong to the pilot who earned them, the Pilotage Authority can not make any deduction except with the express consent of the pilot concerned, unless an explicit authority is stipulated in the Act. Aside from the two statutory deductions mentioned above, there are no others in the present Act. Two further deductions are permissible from pilots’ earnings but not from pilotage dues, i.e., compulsory contributions to the pilot fund (sec. 319 (1) 1934 C.S.A.), and possibly penalties imposed by regulations passed under subsec. (g) of sec. 329, if the regulations provide for such a method of recovery.

It is for this reason that deductions from pilotage dues imposed in the By-laws of the main Pilotage Districts in 1966 (e.g. B.C. District By-law, subsec. (5) of sec. 12 and tariff item 14, P.C. 1966-79 dated January 12, 1966) for radiotelephone rental are illegal. On the other hand, the radiotelephone rental charges against ships are legal because they are components of pilotage dues. As stated earlier, there is no limit to the variety of ways pilotage dues may be fixed, provided they do not contravene the basic principles of the Act, but once pilotage dues are collected they belong to the pilot who performed the services less deductions specifically authorized by the Act. The radiotelephone charge is not one of these. Therefore, in theory, a pilot is not bound by this assessment on his pilotage dues nor by the price so fixed for renting a radiotelephone unit. Furthermore, if he chooses to own a radiotelephone set, the dues (i.e., the “radiotelephone rental charge”) are payable to him.

The situation is quite regular, however, when, as in item 5(a) of the Cornwall tariff, a fixed amount is charged as part of the pilotage dues to cover the land transportation of a pilot, if the Pilotage Authority refrains from disposing of it by regulation in favour of the carrier. The amount thus

charged to the ship belongs to the pilot as part of his pilotage dues and it is his responsibility to pay the cost of whatever mode of transportation he may select.

From the drafting point of view, once a method is adopted, it should be retained for the sake of clarity. The practice is now being followed to segregate in the regulations those provisions which fix pilotage dues. This part, which is called tariff, appears as a Schedule to the General By-law of each District. The tariff, therefore, is that part of the regulations containing all the prices that ships are required to pay for pilotage services, together with whatever regulations exist for computing charges. It follows that nothing else should be included, *inter alia*, any regulations concerning (a) sharing pilotage dues, (b) the total or partial withdrawal of exemptions from the compulsory payment of dues.

The right procedure is followed, for instance, in the Quebec By-law where the "pilot boat charge" and the "radiotelephone charge" appear in the tariff (Schedule, items 5 and 7), while the question of pilot vessel earnings is covered in the By-law proper (subsec. 9(3)) as is the partial withdrawal of exemptions (subsec. 6(2)). On the other hand, the wrong procedure is followed when these two latter questions are dealt with in the tariff, e.g. the partial withdrawal of exemptions in the Port aux Basques tariff (Schedule, item 2).

COMMENTS

The foregoing is the legal situation but the factual situation is altogether different. Due to the basic organizational changes that have occurred in all the main Pilotage Districts, many of the principles enunciated above no longer apply in practice. Since a pilot is no longer a party to contracts for either pilotage or hiring pilot vessels, pilotage dues no longer belong to him in reality and he is paid either a straight salary or a share of the net earnings of the District. These are consequences of the situation created by the new rôle assumed by the Pilotage Authority, i.e., full control of providing pilotage services. As seen earlier, this situation was created as a result of genuine pilotage service requirements and, for that reason, it should be recognized in future legislation. If a new Act is prepared, the various principles governing pilotage dues and pilots' remuneration and earnings will have to be restated.

B. PILOTAGE DUES AS LIQUIDATED CONTRACTUAL DAMAGES

The main underlying principle of the pilotage organization provided by Part VI of the Canada Shipping Act is freedom of contract. A Master, shipowner or agent may hire the pilot of his choice and such pilot may refuse unless the Pilotage Authority has passed regulations in the interest of the

service that he may not refuse to take charge of a ship upon being required to do so by “the master, owner, agent or consignee thereof, or by any officer of the pilotage authority of the district for which such pilot is licensed, or by any chief officer of Customs” (subsec. 329(f)(v)). This will be studied in the next chapter. Most District By-laws include the stipulation that pilots are obliged to accept any assignments given by the Pilotage Authority and its officers, but no By-law has extended this obligation to requests made by a Master, owner or agent. Most By-laws also go further by prohibiting pilots from undertaking any pilotage unless despatched by the Pilotage Authority which, as seen earlier, is *ultra vires* (C. 4, p. 76).

As a rule a pilotage contract takes effect when a pilot is “voluntarily taken on board of such ship by the master for the purpose of piloting her” (sec. 352) and from that moment the ship is obliged to pay the pilot his contractual remuneration, i.e., pilotage dues, whether or not the Master allows the pilot to act in his professional capacity. Sec. 352 creates a firm presumption that a contract is entered into but this is only one of several ways of proving the fact. A pilotage contract, like any other contract, is governed by provincial legislation unless superseded by appropriate *intra vires* federal legislation. Therefore, in the present case a pilotage contract may be concluded by both parties signing a written document or by agreeing verbally. If it can be proved that a contract is not carried out by either party, the aggrieved party is entitled to claim an indemnity against the other for any damages he can establish.

The Act provides an exception to these rules in a very special case. The pilots, as contemplated by Part VI, are free contractors competing with one another for clients, and are supposed to be available at the seaward boarding station at all times so as not to delay incoming ships. Hence, the law makes it an obligation in Districts where the payment of pilotage dues is compulsory for the Master of a non-exempt ship who requires a pilot to accept the services of the first to offer, and if the ship is exempt, of any one of the pilots who offer their services (secs. 348, 349, 350). If the ship does not comply, with the result that a pilot is not taken aboard, the Act stipulates that the contract has been concluded nevertheless. At the same time, in this case the Act liquidates the contractual damages that the ship is liable to pay for failure to carry out the contract by limiting them to the amount of pilotage dues that would have been owing if the pilot’s services had been accepted. For collection purposes the section concerned stipulates that these damages are payable “as pilotage dues”.

As seen earlier, this situation does not arise nowadays because the conditions outlined in these sections no longer (C. 3, pp. 60-61 and C. 5, pp. 103 and 104).

C. PILOTAGE DUES PAID AS PENALTY

In Districts where the payment of pilotage dues is compulsory, if a pilot has not been required and is not employed the effect of the compulsory payment system is that a non-exempt ship remains liable to pay the same amount of pilotage dues as if a pilot had been employed.

This money does not belong to any pilot because it is paid, not as a result of a contractual engagement, actual or presumed, but in compliance with the Act. This liability is, in fact, a penalty but the term was not used in the Act to avoid the charge that the system involved "compulsory pilotage" as will be seen in C. 7, p. 212.

By identifying such money with pilotage dues the Act has given this penal sanction the nature of a civil debt created by statute, i.e., what is now called a penalty as opposed to a fine (re meaning of the terms *fine* and *penalty*, vide C. 9. pp. 380 and 381). The provisions of the Act which create this statutory debt are contained in secs. 345 and 357:

"345. Every ship that navigates within any pilotage district within the limits of which the payment of pilotage dues is, for the time being, made compulsory under this Part shall pay pilotage dues, unless. . ."

"357. (1) Where, in a pilotage district in which the payment of pilotage dues is compulsory, the master of a ship that is not an exempted ship removes such ship or causes such ship to be removed from one place to another within any pilotage district, without the assistance of a licensed pilot for such district, he shall pay the pilotage authority the same pilotage dues as he would have been liable to pay if he had obtained the assistance of one of such licensed pilots."

Therefore, in these circumstances, the same pilotage dues are payable whether or not a pilot has been employed. The amount of the penalty is established by reference to the tariff which fixes prices for services rendered (vide p. 151 *supra*). The intent of the Act is that a ship will not benefit financially by dispensing with the services of a pilot and shall receive a bill for pilotage dues, which is exactly the same as if a pilot had actually been accepted. It follows that this requirement should be reflected in the tariff by fixing the rates for pilotage services rendered so that the amount can be readily calculated and that the result is the same whether or not a pilot is employed.

As pointed out earlier (vide p. 151 *supra*), *any* competent of pilotage dues which is left to chance is illegal, e.g., travelling expenses if no pilot happens to be available where required. It is also illegal to make whatever expenses a pilot has actually incurred a component of a charge because they will vary depending upon the individual who incurs them. The solution is to

establish a fixed amount (cf. the travelling expenses of the Cornwall pilots to Ste. Catherine or St. Lambert Lock), or to lay down a formula from which the charge could be objectively calculated in any circumstances, such as reference to an official tariff which applies in such cases.

The Pilotage Authority does not implement the compulsory payment system in its entirety if it charges only the component that happens to coincide with a pilot's remuneration, e.g., prior to 1966 a comprehensive charge of \$80 was payable by non-exempt vessels in the Churchill District and the fact that this charge has since been broken down into two components, pilotage charge and pilot boat charge, has not altered the situation. For this reason a ship in transit in the Quebec District which fails to embark a pilot at Les Escoumains should be charged full dues: basic charge computed on tonnage and draught, pilot boat charge at Les Escoumains, Grade A surcharge if applicable, the radiotelephone charge unless she carries the required equipment. In Districts where fixed or objectively ascertainable travelling expenses are a component of the dues, they should be added.

Not all pilotage dues come under the compulsory payment system, only those defined in secs. 345 and 357, quoted above, as payable for pilotage and movages. Therefore, pilotage dues such as the following do not fall into this category: detention, cancellation, security watch.

D. COLLECTION OF PILOTAGE DUES

The collection of pilotage dues implies two questions:

1. To whom should payment be made?
2. What collection procedure should be followed?

1. To whom dues are payable

According to civil law a debt is payable only to the creditor, the only person who can give a discharge, or to an agent duly appointed for that purpose by the creditor. Similarly, only the creditor to whom money is owed can sue for its recovery.

However, these rules may be modified by unequivocal statutory provisions, as was shown by the 1920 Privy Council judgment in the case of *Paquet v Corporation of Pilots of Quebec Harbour* 1920 A.C. 1029 (1920, 54 D.L.R. 323). In the 1860 Act, which created the Quebec Pilots' Corporation, the Parliament of Lower Canada enacted a provision of exception which made pilotage dues for services rendered by the Quebec District pilots payable to, and the property of, the Corporation. In an Act passed in 1914, the Federal Parliament withdrew these extraordinary powers from the Pilots' Corporation and vested them in the Minister of Marine. The Minister, however, did not exercise these powers and let the Corporation proceed as if the 1914 Act had never been enacted. Pilot Paquet sued the Corporation for the reim-

bursement of dues which he had earned but which the Corporation had collected. The Minister did not intervene in the case. The Privy Council judgment recognized the constitutional validity of the 1914 Act and held that the Corporation had no rights over the earnings of the pilots since that date.

The present legislation contains such provisions of exception:

- (a) Sec. 343 by saying that the pilotage dues "may be recovered as a debt due to the pilot or pilotage authority as the case may be, to whom the same are payable" indicates that only the pilot or the Pilotage Authority can sue for their recovery. The only question is to which of the two are the dues payable.
- (b) Secs. 348 and 349 make dues owed as liquidated contractual damages payable to the Pilotage Authority which alone can sue for their recovery. Afterwards the Pilotage Authority must determine which pilot, if any, has any claim to them (sec. 351).
- (c) On the other hand, the Act does not stipulate to whom dues owing as penalties under the compulsory payment system are payable.
- (d) While the context of the Act indicates that dues owed for services rendered are payable to the pilot who performed the services, it appears from the last part of subsec. (h) of sec. 329 that, nevertheless, regulations can be passed to make them payable to the Pilotage Authority.

The reason why *dues payable as liquidated contractual damages* are made payable to the Pilotage Authority instead of to the pilot who is entitled to them is obvious: there can be no dispute about a ship's liability to pay dues but the identity of the creditor pilot may be open to question. No doubt to avoid unnecessary litigation it was provided that, in these cases, the Pilotage Authority alone is entitled to receive payment with the subsequent responsibility of determining whether or not any pilot has a claim and, if so, to pay him the amount due under the District By-law (subsec. 351(1)(b)); if not, to apply the dues to the benefit of the pilots in general by crediting them to the District pilot fund (subsec. 351(2)).

With regard to *dues payable as penalties under the compulsory payment system*, there is only an indirect mention (except for movages, sec. 357) that they are payable to the Pilotage Authority because these dues belong to the Pilotage Authority. As seen above, these penalties are civil debts, created by statute (secs. 345 and 357), which belong to the Pilotage Authority's operating expense fund (sec. 328). In former legislation, this point was partly covered in the section corresponding to the present sec. 345 where it was provided that in the case of outward voyages such dues were payable to the Pilotage Authority. *Inter alia*, the inward voyages of non-exempt vessels which did not require a pilot, transit voyages and voyages completed within a District were not covered. Such a provision was last included in the 1927

C.S.A. in sec. 456. However, if it should be considered desirable to retain the compulsory payment system, future legislation should call these dues “penalties” and, in order to avoid any possible ambiguity, it should clearly indicate to whom these penalties are payable and how they should be disposed of.

As for *dues payable for services rendered*, the context of the Act clearly indicates that they belong to the pilot who performed the services and are payable to him:

- (i) Secs. 348 and 350, when dealing with the amount to be paid as liquidated damages, state that it is to be “the same sum as would have been *payable to such licensed pilot* if his services had been accepted”.
- (ii) Sec. 352 states that a ship is liable “to pay pilotage dues *earned by any licensed pilot* voluntarily taken on board of such ship by the master for the purpose of piloting her”.
- (iii) Secs. 359 and 360, when dealing with the indemnities payable to a pilot overcarried beyond the limits of his District or detained in quarantine, stipulate that this indemnity is to be paid “over and above the pilotage dues *otherwise payable to him*”.
- (iv) Subsec. 362(1) provides for an automatic set off between the damages awarded by a Court as a result of the neglect of a pilot and the *pilotage dues to which this pilot would have been entitled*.
- (v) Sec. 372 makes it a statutory offence for a licensed pilot to *demand or receive* “any sum in respect of pilotage services greater than the dues for the time being demandable by law”.

Nevertheless, in all the main Districts since the early days of controlled pilotage the pilots have been denied the right to collect dues. The By-laws of most Districts provide that the dues are payable to the Pilotage Authority which, in fact, arrange collections through its officers. The authority for this By-law provision is the last part of subsec.(h) of sec. 329 C.S.A. Although the text is far from clear, there is no other logical interpretation. It reads as follows:

“329. . . . every pilotage authority shall . . . have power . . . by by-law confirmed by the Governor in Council, to . . .

- (h) fix the rates, on either the same or different scales, of payments to be made in respect of pilotage dues and the mode of remunerating the pilots licensed by such authority, and the amount and description of such remuneration, and the person or authority to whom the same shall be paid;”

At first sight the last part of subsec.(h) seems to answer the question but such a construction can not be grammatically correct: “the same” must refer

to "remuneration" and not to "pilotage dues". The expression "the same" means "the aforesaid antecedent" which in this sentence is "remuneration". This is confirmed when reference is made to the French version. The last sentence in the French text reads as follows: ". . . *et désigner la personne ou l'autorité à laquelle la rémunération doit être versée*;" The French text, therefore, leaves no room for interpretation or confusion and the word "remuneration" in subsec.(h) can only refer to the term used before, that is "*rémunération des pilotes brevetés*" and not to the "*droits de pilotage*".

Hence, a strict interpretation leads to the absurd situation where dues for services rendered are payable to the pilot who performed the services (as is amply indicated by the context of the Act) but the Pilotage Authority has the right, by regulation, to force the pilot to pay over to some third party that part of these dues that the regulations have defined as being his remuneration. This is quite illogical. Such a drafting error is occasionally found in legislation, normally when amendments are made. The error was first committed by an amendment in 1886 but was compounded by a further amendment to correct the first error in 1934.

The evolution of what is now subsec.(h) indicates clearly that the legislature's intention was to enable the Pilotage Authority to take over collection of the dues, provided this power was specified in the By-law regulations.

In the 1873 Act, pilotage dues, tariffs, pilotage rates, remuneration for pilotage services and remuneration of pilots were all one and the same thing. The first part of subsec. (8) of sec. 18 reads as follows:

"8. To fix and alter the mode of remunerating the pilots licensed by such authority, and the amount and description of such remuneration (in this Act called pilotage dues), and the person or authority to whom the same shall be paid".

Therefore, in 1873 there was no possibility of confusion, the pilotage dues were the remuneration of the pilots and the Pilotage Authority had the power to designate by regulations a person or an authority to whom the dues were payable.

When the Act was consolidated in 1866, the text between parentheses was deleted leaving the subsection otherwise unchanged. At the same time the definition of "pilotage dues" that still prevails (except for one slight modification) was introduced in the interpretation section, i.e., "the remuneration payable in respect of pilotage". This first amendment created a problem of interpretation in that the term "pilotage dues" that is used throughout the Act was not included in sec. 15 which listed the subject-matters of the regulation-making power of the Pilotage Authority and, in particular, was absent from subsec.(h) which dealt with fixing the price a vessel had to pay as pilot's remuneration. This amendment was no doubt introduced to indicate

the slight difference between pilotage dues and pilot's remuneration, as explained earlier (C. 5, pp. 107 and ff. and C. 6, pp. 182 and ff.). This amendment caused a certain *non sequitur* which, however, was corrected by the context of the Act. It was quite clear that pilotage dues were the remuneration of the pilot, i.e., the price paid for the pilot's services and that the Pilotage Authority had to fix the rates by regulation under subsec.(h). Therefore, "the same" referred to that price which was called in the text of subsec.(h) the "remuneration" of the pilot and which was identified by the context with pilotage dues.

Subsec.(h) remained unchanged until the Act was amended in 1934. The reference to pilotage dues was re-inserted in subsec.(h) but due to another drafting error the last part of the subsection was not grammatically related to the term "pilotage dues" to which it had always referred and was still intended to refer.

Therefore, the present situation is that, despite the ambiguity of the text, it is permissible to stipulate in the regulations that pilotage dues for services rendered are payable to someone other than the pilot who earned them. The next question is to whom they could be made payable. The generality of the terms "the person or the authority" and the absence of any qualification or criterion suggests that the Pilotage Authority has entire discretion to designate any person it chooses. However, this power is limited by sec. 343 to a choice between the pilot himself or the Pilotage Authority, because if the dues were made payable to another party they could not be collected since sec. 343 stipulates that they are "a debt to the pilot or to the pilotage authority" and to no one else and the criterion to determine which of the two is the creditor is "to whom the same are payable".

In the history of controlled pilotage in Canada, the collection of dues for services rendered has rarely been left a responsibility and prerogative of the pilot concerned, unless (a) the Pilotage Authority had other sources of revenues to meet its expenses and (b) the pilots were not required to contribute to a pilot fund, such as is at present the case in the Prince Edward Island District. It was soon realized that when either of these two conditions is not met, the Pilotage Authority has to take over the exclusive right to collect the dues. For instance, when Quebec Trinity House was created in 1805, it had revenues of its own and its only concern with pilotage dues was to ensure that the pilots made their compulsory contribution to the Decayed Pilot Fund. This contribution of eight pence per pound of earnings was to be paid by each pilot to the Clerk of the Corporation twice yearly, and the Act provided severe punishment for failure to pay and for filing false returns. Trinity House immediately experienced difficulty making the pilots pay their contribution, and the Act was amended in 1807 to provide for a system of deduction at source by having a Government official, the Naval Officer, retain the pilots' contribution out of the pilotage dues collected from Masters at the same time he collected the port charges.

In addition to eliminating complicated verification, the assumption by the Pilotage Authority of responsibility for collecting dues benefits the individual pilot by relieving him of both the tedious duty and responsibility of collecting and the risk of enforcing collection through court proceedings, if necessary.

There should be no ambiguity about the person or authority to whom pilotage dues are payable. The matter should be clearly defined in legislation, but there should be sufficient flexibility to provide for various types of organization within the service. It is considered desirable that the Act should stipulate that these dues are payable to the Pilotage Authority unless there are regulations to the contrary.

In addition to enhancing simplicity and clarity, this would be a realistic provision. Its necessity has been proved by past experience and is even more clearly indicated now that the Pilotage Authority in each main District has assumed responsibility for providing pilotage services and for pooling the pilots' earnings, wherever the pilots have not become its direct employees.

It should be the exception rather than the rule to make dues payable to the pilot who performed the services; this should be the case only when the Pilotage Authority's function is limited to licensing and pilotage service is provided by one or a few pilots acting as free entrepreneurs.

The dues should not be made payable to anyone else except to a person or authority whose duties and responsibilities toward the pilots are clearly defined in the regulations, and who is accountable to the Pilotage Authority and under its active surveillance for the disposal of pilotage dues. This might occur in Districts where the pilots are not employees of the Pilotage Authority and the Pilotage Authority does not consider that the interest of either the service or the public necessitates taking over full control. Under such circumstances, if the majority of the pilots so wish, despatching and pooling of earnings could be exercised by their own Corporation, in which case the dues would have to be made payable to the Pilots' Corporation.

Pooling of earnings

This raises the question of the nature and the constitution of such a pooling system. Whether the pool is operated by the Pilotage Authority or by the Pilots' Corporation, the Act should stipulate the form the pool takes, the money of which it consists and what expenses may be deducted from it. The Act should also provide effective measures of control. Again, basic rules should be enunciated with the possibility of exceptions being made by regulation to meet exceptional circumstances.

The first system for pooling pilots' earnings was created by the 1860 Act which incorporated the Quebec Pilots' Corporation. The Act stipulated that all monies derived from the pilotage of ships and from other services performed by the pilots for which a rate was fixed in the tariff were payable to the Corporation. At the same time, the Corporation was given almost full

control over despatching, an essential condition for the efficient operation of a true pooling system. The difficulties that were met arose from restrictions that were imposed on its despatching powers, i.e., the right of the Master to exercise a certain choice and the special pilot system.

At present, there are various pooling systems (vide C. 4, p. 74). In British Columbia, where both despatching and pooling are operated by the Pilotage Authority, the pooling system is of the most complete type. Not only are all pilotage earnings pooled but also any money related to the exercise of the pilots' profession, such as indemnities for overcarriage or quarantine, insurance benefits for loss of remuneration during absences due to illness, remuneration not provided for in the tariff but paid for expert advice and the indemnities or earnings for services outside district limits. Since a share in the pool is based on the time a pilot is available for duty, it is logical that all earnings he derives directly or indirectly from the exercise of his profession during the time he is considered as being on duty becomes part of the pool. All the expenses incurred for the benefit of the group, including premiums for group insurance which the pilots decided to take out by a majority vote, are paid out of the common fund before sharing.

On the other hand, in the Quebec District where the Pilotage Authority controls despatching and the pilots operate their own pool, only earnings derived from pilotage trips are pooled and each individual pilot retains any extra money he earns from movages, compass adjustments, Grade A bonus and indemnities under secs. 359 and 360 C.S.A. Complete pooling could not be equitably effected because the pilots had no legal control over sharing their workload and a common basis other than availability for duty had to be found. They had to adopt a system where shares were calculated on the basis of work actually performed and it was, therefore, necessary to ensure that only comparable work was included. There was no problem in the Quebec District because revenues from pilotage trips account for most of the District's gross earnings. The pooling system adopted consisted mainly of averaging the net value of a pilotage trip. The earnings of all the pilots are pooled as collected but each pilot is remitted periodically anything he has earned additional to pilotage trips, e.g., movages and compass adjustments. After group expenses have been paid, the average value of a "trip" for pooling purposes is found by dividing the remaining total trips earnings by the number of trips performed. Each pilot is then paid his share representing the trips he has performed multiplied by the set price. The Quebec pilots' pool also serves the same purpose attributed by the Act to the pilot fund, i.e., for benefits, illness (even suspension). The main criticism by some Quebec pilots concerned the lack of any control over the administration and operation of the pool by their own Board of Directors (vide C. 4, p. 91).

The introduction of grades for pilots has created another problem. In the Quebec District this was solved in two ways: first, by not pooling the

Grade A bonus; secondly, by attributing a lower value to a trip performed by a Grade C pilot. The system discriminates in favour of Grade A pilots in that this bonus makes no contribution to general expenses despite the fact it is part of the actual revenue from trips. In practice, this factor is unimportant in view of the relatively small amount of revenue now derived from that source, but in a complete pooling system it should be corrected.

Study of the evidence received on the subject (including the organization of the various pooling systems now in use) and consideration of the requirements of the pilotage service suggest the following rules for operating such pools:

- (a) both pooling and despatching should be operated by the same authority;
- (b) as a rule, pooling should be based on availability for duty and not on work actually performed;
- (c) only pilotage revenue should be pooled, i.e., dues for which the tariff prescribes either a rate for usual assignments or *ad hoc* charges for occasional services;
- (d) each pilot's share in the pool should be treated as if it were a salary and, therefore, the legislation should provide for regular leave of absence and sick leave of limited duration, both with pay;
- (e) other revenue a pilot earns, whether or not related to his expert knowledge, should not enter into the pool, but the time he spends earning this revenue should not be considered time on duty for purposes of calculating his share in the pool;
- (f) the pool should reflect pilots' grades (where they exist) by providing an appropriate scale of shares;
- (g) deductions from the pool should be:
 - (i) District operating expenses less what is paid from other sources;
 - (ii) the pilots' compulsory contributions to the pilot fund (if one exists);
 - (iii) expenses incurred by the pilots as a group, or for their common benefit, provided they are incurred for the purposes, and pursuant to the procedure, laid down in the regulations, and not otherwise;
- (h) the pool, whether operated by the Pilotage Authority or by a Pilots' Corporation, should be subject to audit by the Auditor General of Canada;
- (i) the persons or authority responsible for operating the pool should bear the penal and civil responsibility of public officers entrusted with public funds under the Financial Administration Act.

2. Nature of Pilotage Claim, Collection Procedure

Pilotage dues, whatever their nature, are recoverables as a civil debt before the appropriate courts of civil jurisdiction (C.S.A. sec. 343). The procedure provided for the collection of fines (secs. 683 and ff.) and for penalties (sec. 709) does not apply.

Part XV of the C.S.A., dealing with legal proceedings, is silent on the matter, except that sec. 699 provides for executing against a ship any unsatisfied judgment rendered by any court against its Master or owner. The court concerned "may, in addition to any other powers they may have for the purpose of compelling payment, direct the amount remaining unpaid to be levied in distress or poinding and sale of the ship, her tackle, furniture and apparel".

The Pilotage Act, 1913, of the United Kingdom provides in sec. 49 (cf. sec. 341 C.S.A.) that pilotage dues may be recovered as fines but there is no corresponding provision in Canadian legislation.

As far as Canada is concerned, a claim for pilotage dues is considered an ordinary claim and no lien, guarantee or preferred rank is attached to it. No doubt when dues are payable to the Pilotage Authority, a claim will enjoy the general privileged rank granted to Crown claims; but this would not be the case if the dues are payable to a pilot personally. As seen earlier (C. 4, p. 67), subsec. 2383 (2) of the Quebec Civil Code, which is a pre-Confederation provision, grants a maritime lien on a ship to a pilot's claim and gives it a preferred rank in all cases.

Pilotage dues (except in the case of sec. 357 C.S.A.) are a debt payable by the ship (vide secs. 344, 345, 348 and 350 C.S.A.). In addition, sec. 341 makes additional co-debtors, "the owner, the master and the consignee or agent of any ship if such consignee or agent has sufficient moneys in his hands received on account of such ship". Therefore, any one of them could be sued for the recovery of dues.

For reasons that the Commission has been unable to discover, only the Master is liable to pay under the compulsory payment system dues owing when a ship is "removed from any place to another within any pilotage district without the assistance of a licensed pilot" (sec. 357). According to the rules of interpretation, such a specific indication can only be read as an exception to the rules previously stated, because otherwise the specification would be either meaningless or superfluous. Therefore, in this case neither the owner, consignee, agent nor the ship may be sued. But, as seen earlier, if the judgment obtained against the Master is unsatisfied, execution proceedings can be taken against the ship (sec. 699). This is an unnecessary and unwarranted complication which, if the provisions of sec. 357 are to be retained, should be made to conform with the general rule.

In the past, recovery proceedings had to be taken on occasion, especially when a dispute arose over the propriety of the charge or exemptions. Some of these cases are found in jurisprudence, e.g., *Quebec Corporation of Pilots v Brigantine Horsey*, 1884, 10 C.S. 257. However, in recent years there is no record of any legal proceedings being taken for such a purpose. The Department of Transport states "...to our knowledge there has not been any case during the past decade in which a Pilotage Authority has instituted a legal proceeding, either in its own name or the name of the Crown" (Ex. 1488).

Despite the absence of legal proceedings, very few accounts remain unpaid. The reason is, in part, sec. 344 C.S.A. which gives a Pilotage Authority the extraordinary power to detain a ship without any form of legal process by withholding clearance until pilotage dues are paid.

Sec. 344 reads as follows:

"344. (1) No Customs officer shall grant a clearance to any ship liable to pilotage dues at any port in Canada, where there is a duly constituted pilotage authority and at which pilotage dues are payable, until there has been produced to such Customs officer a certificate from the pilotage authority of the district that all pilotage dues in respect of such ship have been paid or settled for to the satisfaction of such authority.

(2) No Customs officer at any port in Canada shall grant a clearance to any ship if he is advised by any pilotage authority in Canada that there are outstanding and unpaid any pilotage dues in respect of the ship".

Clearance can be defined briefly as permission to proceed on an outward voyage given to a ship not holding a coasting licence by the Customs officer³ of a port, after he has satisfied himself that the ship has complied with the following requirements:

Customs Act (secs. 80 and 82)

Immigration Act (sec. 46)

Canada Shipping Act (sec. 135, certificate of competency or service); (sec. 176, shipping master's certificate); (subsec. 315(6), payment of sick mariners' duty); (sec. 344, payment of pilotage dues); (sec. 412, Radiotelegraphy and Radiotelephony Certificates); (secs. 437 and 442, Load Line Convention Certificate); (sec. 448, timber certificate); subsec. 464(1) unseaworthy ships); (sec. 484, safety and inspection certificates).

³(Vide Department of National Revenue Customs and Excise Memorandum D-18, Ex. 1489).

Coasting vessels (i.e., belonging to the coasting trade of Canada as defined in subsec. 2(13)) are issued an annual coasting licence (Customs) which allows them to enter and leave Canadian ports without obtaining clearance from a Customs officer. Therefore, sec. 344 does not apply to them. Such a coastal licence can not be withdrawn or suspended nor can its renewal be refused for failure to pay pilotage dues, because there is no authority either under sec. 344 or anywhere else. Since the power given in sec. 344 is of a very exceptional nature, it can not be exercised unless it is based on an explicit statutory provision. For the same reason, the terms of sec. 344 must be interpreted strictly and the expression "clearance" can not be taken as also referring by extension to coasting licences.

The penalty for sailing without a clearance is contained in subsec. 230(1) of the Customs Act which provides that "if any vessel departs from any port or place in Canada without a clearance . . . the master shall incur a penalty of four hundred dollars . . ., and the vessel shall be detained in any port in Canada until the said penalty is paid".

The necessity for this extraordinary procedure arises from the practical and legal difficulties of collecting a debt incurred in Canada when the debtor has left the country. The purpose of withholding clearance is simply to keep the vessel under the jurisdiction of Canadian courts until the dispute is settled and the judgment satisfied. This is not the case with coastal vessels because they never leave Canada. Withholding clearance is, in practice, summary arrest before judgment and hence should not be used as a means of compulsion to exact payment of a contentious claim while effectively depriving the alleged debtor of the opportunity to offer his defence before a Court.

It is believed that the wording of sec. 344 may give rise to much abuse, in that it does not provide the normal remedy in cases where a dispute is over the payment of a sum of money, i.e., either the possibility of payment under protest, or the deposit of a sum of money in escrow, or furnishing a bond to guarantee the payment of a judgment, in principal, interest and costs, if and when obtained against a ship, thereby allowing the ship to sail without undue delay, while affording on one hand the guarantee of a payment of a just claim and a check against any abuse of this extraordinary power of detention.

The right to have the clearance of a ship withheld, as provided in sec. 344 as drafted, amounts to nothing less than forcing the ship into unconditional surrender to the Pilotage Authority's demand for payment, since the Customs officer is prevented from issuing clearance without first obtaining permission to do so from the least disinterested party, i.e., the Pilotage Authority, who is the alleged creditor. The danger inherent in this procedure is that the losses a ship suffers during the delay while the case is settled in court exceed the relatively small amount of the contested debt to such an extent that in practice the owner is coerced into paying. In fact, in all cases

where this procedure has been applied to date the owners of the ships involved have preferred to pay rather than be delayed and, later, have not taken the trouble to institute legal proceedings against the Crown to settle the point at issue. For instance, the compulsory payment of dues has been enforced in this fashion by the Pilotage Authorities of the Districts of Quebec and Montreal despite the fact that the compulsory payment system has not applied in these Districts since the 1934 C.S.A. came into force. If the Pilotage Authority had been obliged to establish its claim before a court it would not have succeeded, with the result that some effort would have been made since 1934 to have the proper amendment made to the Act, if it was considered that the compulsory payment system was an essential feature in these two Districts.

Sec. 344 provides two modes of procedure. The first is contained in subsec. (1). It is the original provision but now outdated and no longer applied. It requires a positive act on the part of the Pilotage Authority in each case before a clearance can be granted. The second, which was introduced in 1934, is much more extensive and more in conformity with present needs, in that clearance is withheld only if a specific request is made by a Pilotage Authority.

The first subsec. of sec. 344 was introduced into pilotage legislation by an amendment in 1877 (40 Vic. c. 20, sec. 4) and, except for wording, has since remained unchanged in principle. Its scope is very limited for it applies only (a) to pilotage dues payable to the Pilotage Authority and (b) to the District from which the clearance is to be issued.

In 1877, ships paid cash for all charges they had incurred but this situation no longer prevails. Pilotage dues are now paid after a ship's departure by billing the agent or owner in conformity with general business practice. Since compliance with the provisions of sec. 344 would be perfunctory, the practical attitude taken by both the Customs officers concerned and the Pilotage Authorities is simply to ignore the imperative but unrealistic, obsolete provisions of subsec. (1). This, however, they do at their own risk and their attitude is basically wrong. If it is considered that subsec. (1) is no longer capable of application, steps should be taken to have it repealed. Until the Act is amended all authorities are bound by its imperative provisions and can not take it upon themselves to ignore any law passed by Parliament.

The 1934 amendment to sec. 344 introduced a more realistic and effective procedure in that any Pilotage Authority has recourse against any ship to recover outstanding pilotage dues but this remedy is applied only upon request. The remedy is complete in itself and should have replaced the obsolete subsec. (1) instead of being merely added as a second subsection. According to this new procedure, whenever a Pilotage Authority believes a

ship is a credit risk because dues are owing, it may request the Customs officers of any port in Canada to withhold clearance until the outstanding dues are paid.

How the two subsections of sec. 344 are applied is explained by the Department of Transport in a letter dated August 9, 1966 (Ex. 1490) which reads in part as follows:

"... to my knowledge Section 344(1) of the Canada Shipping Act has never been strictly adhered to.

Since outward pilotage cannot be billed for before the service has been performed, strict adherence to this section would mean almost 100% increase in the work of the pilotage offices in the main districts. In addition, it would not be in accordance with normal business practice and would cause a great deal of stress and confusion in the offices of the busy shipping agencies.

On the other hand, the section has been used in the rare cases where doubt existed as to the intention of the shipowner or master to pay pilotage dues, or to enforce payment in cases of extreme delay in payment of such dues.

We do not know of any place where the pilotage authority issues the certificates mentioned but no general instruction was issued to Customs officers in this regard."

The Halifax District Supervisor testified that he had only once been obliged to follow the procedure detailed in sec. 344. On that occasion under subsec. 344(2) he required the Customs officer at Dalhousie to withhold the clearance of a ship that had arrived at that port because pilotage dues were owed to the Halifax Pilotage Authority. He added that the debt was paid within four or five days and the vessel was released.

If the dues are payable to the Pilotage Authority, the billing and collection of all pilotage claims in the District are affected. Since the procedure consists of addressing bills to the agent or owner by mail, payment is effected long after a ship has left the District and, generally, the country. In the case of a round trip on the St. Lawrence and the Great Lakes it is the practice of certain companies to wait until all bills for pilotage dues in the various Districts en route are received and to make only one payment for the aggregate amount. The average time for receipt of payment is about one month after a bill is sent. The pilots have complained repeatedly that the Pilotage Authority is negligent in the collection of bills by allowing some to remain outstanding over a period of months (vide Part IV, Quebec District, *Financial Administration*). Very few pilotage accounts are not paid although there have been some cases of bankruptcy. Since most ships trading in Canadian waters return to a Canadian port, at one time or another, subsec. 344(2) has proved an effective deterrent.

A Pilotage Authority has no discretion whether or not to collect pilotage dues made payable to it by legislation. Once a tariff has been established by regulations, the Pilotage Authority must implement it. The By-law, including the tariff, is, together with the Act, the law of that District binding on all concerned: shipping interests, District pilots and Pilotage Authority alike.

Where dues for services rendered are payable to the pilot concerned, it is his own responsibility to obtain payment and, if he is negligent, he harms nobody but himself, but, when the dues are made payable to the Pilotage Authority, part of its fiduciary responsibility is to collect them in full, unless prevented by circumstances beyond its control. If, in certain cases, it is felt that the full amount of the dues should not be charged, and if the dues belong to one pilot, this pilot's authorization alone would relieve the Pilotage Authority of its obligation. However, if the dues belong to the Crown, only the Governor in Council, acting on the recommendation of the Treasury Board pursuant to sec. 22 of the Financial Administration Act, can approve an exemption. In both cases the loss of pilotage dues through the negligence or fault of a Pilotage Authority entails, *inter alia*, its personal civil responsibility.

COMMENTS

It is considered that pilotage dues should continue to be considered a civil claim enforceable before the appropriate court of civil jurisdiction.

If the compulsory payment system is retained, the statutory debt created thereunder should be called a penalty and collected as a normal civil claim before the same court.

It is further considered that it should be clearly indicated that the recovery of such a debt could be pursued in the Admiralty Court by proceeding *in rem* as well as *in personam*. This point is at present not clear, either here or in the U.K. (vide *British Shipping Laws*, Vol. II, Temperley, 1963 edition, para. 1364, note 2).

The Act should give any pilotage claim (pilotage dues and any other money owed by ships under pilotage legislation and contract, including contractual damages) privileged rank as well as a maritime lien against the ship involved.

Subsec. (1) of sec. 344 C.S.A. should be abrogated. Subsec. (2) should be retained but its arbitrary restriction should be corrected to permit a ship to obtain clearance by providing the Pilotage Authority a guarantee of payment when the point of contention is decided by the appropriate court. In such a case the Pilotage Authority should be required to institute recovery proceedings within a fixed period, failing which the guarantee would be cancelled.

II. OTHER CHARGES TO SHIPPING: FINES AND INDEMNITIES

Various sections of the Act provide for *finés* to be imposed on shipping in certain circumstances as follows:

- (a) The Master of a ship is liable to a fine in the amount of double the pilotage dues payable if he makes a false declaration to the pilot about the ship's draught (subsec. 340(2)). As seen earlier,

the reason for this severe penalty is that this information has a direct bearing on the safety of the ship.

- (b) A non-exempt ship which requires the services of a pilot in a District where the payment of pilotage dues is compulsory but which fails to show the signal for a pilot, or to facilitate his coming on board, is liable to pay to the Pilotage Authority what amounts to a fine, the amount of which is not to exceed the dues payable to the pilot (sec. 349 and subsec. 350(1)) if his services had been accepted.
- (c) In any District, a Master who employs an unlicensed pilot without lawful excuse is liable to a fine not exceeding \$250 for each day of violation (secs. 354 and 356).
- (d) Failure on the part of a Master to display a pilot flag when there is a licensed pilot on board renders him liable to a fine not exceeding \$250 (sec. 367).

Fines are payable to the Crown. Sec. 683 states how they are to be recovered, while sec. 707 states how they should be disposed of, i.e., they are to be recovered at the suit of any interested party before a court of criminal jurisdiction and are to be paid to the Consolidated Revenue Fund of Canada, unless otherwise directed by the trial judge. A fine awarded against a ship, her owner or Master, can be recovered by execution against the ship (secs. 698 and 699).

The question of the recovery of the unnamed pecuniary punishment of subsec. 350(1) poses a problem. According to one of the rules of interpretation "words should be consistently used; if the same meaning is intended, the same words should be used, and if different things are intended different words should be chosen" (Driedger, *The Composition of Legislation* 1957, p. 125). This pecuniary punishment can not be collected as a statutory debt because the amount is not determined but is left, as in the case of a fine, to be fixed by the court within a stated maximum. The fact that the word fine is not used as is done elsewhere should be interpreted as an indication that the reference is to a different thing, and, therefore, that sec. 683, which details the method of collecting fines, does not apply. This is an unnecessary complication which should be corrected if the provisions of this subsection are to be retained.

The other group of pilotage monies payable by shipping is composed of *indemnities, living out and travelling expenses* made payable under the Act to pilots carried outside the limits of their District, or detained in quarantine through circumstances over which they had no control (secs. 359 and 360). These are not pilotage dues and a Pilotage Authority has no power to deal with these indemnities in its By-law. They can not be part of a pilotage fund but belong solely to the pilot concerned as a debt owed to him personally by the ship.

To collect these indemnities and related costs the pilot concerned submits his account to the agent either personally or through his Pilotage Authority. Normally, as in the Quebec District, this money does not form part of the pilotage fund but there is a section in the By-laws of the Districts of British Columbia, Halifax, Sydney and Saint John which expressly provides for payment into the pilotage fund for eventual sharing among all the pilots (Ex. 1466(x)). Under the present legislation these By-law provisions are ultra vires of the regulation-making power of the Pilotage Authorities in that they are in direct contradiction to an express provision of the Act. However, where the pooling of the pilots' earnings is effected by the Pilotage Authority and sharing is on the basis of the pilots' availability for duty, any time lost for these reasons should not be counted absences for the purpose of sharing the pool (vide C. 7, pp. 192 and 193). The situation envisaged by secs. 359 and 360 is in conformity with the basic organizational principle underlying Part VI, namely, the only possible status for pilots is self-employed, free entrepreneurs whose remuneration consists of pilotage dues they earn by their own efforts.

Aside from living out expenses and travelling costs, indemnities are limited to \$15 per day. The amount has always been rather low: \$2 per day in the 1873 Pilotage Act (sec. 40), raised to \$3 per day in 1934 (secs. 352 and 353). No doubt the reason it is maintained so low is that these situations are recognized as occupational hazards which arise in circumstances beyond the control of either the pilot or the ship. Therefore, it is strictly an indemnity in which profit should have no part.

However, sec. 359 does not apply when a pilot is carried over for a ship's convenience. If this occurs without his consent, the pilot has full recourse in damages against the ship for breach of a contract which implied an obligation to let him disembark at the regular boarding station after reaching the district limits. If a Master decides to do otherwise for his own convenience the ship should bear full responsibility.

Another situation that currently arises in coastal pilotage, and occasionally elsewhere, is when a pilot has to embark in a port situated a long distance away from his District, or when a pilot agrees to be carried over for a ship's convenience. Under the present legislation there is nothing to prevent a pilot from doing so and whatever indemnity he may ask for is a matter of private agreement between himself and the ship concerned. This extra service is rendered outside district limits and, therefore, is beyond the jurisdiction of the Pilotage Authority. The only control a Pilotage Authority has is through the pilot's licence by requiring the licence-holder to remain available within the District unless he first obtains leave from his Pilotage Authority. This situation agrees with the type of organization provided under Part VI but it is totally inadequate in a system where the pilots' earnings are pooled and where a Pilotage Authority dispenses pilotage services and con-

trols the practice of the profession. This is the situation that forced the Pilotage Authority in British Columbia to include in the tariff the *per diem* indemnity to be paid to its pilots when they are retained outside district limits for a ship's convenience. Because British Columbia is a coastal District it is a practical impossibility to maintain boarding stations at all possible places where ships may choose to enter the District. On the other hand the service should be flexible enough not to inconvenience vessels unduly by requiring them to make long, costly detours to embark and disembark pilots. This situation must be considered and provided for.

Under existing legislation these charges are not pilotage dues and their payment cannot be enforced as such. If a ship fails to pay, the only recourse is for the pilot concerned to sue for the recovery of the indemnity; the amount stipulated in the tariff may only serve as an indication of the pecuniary consideration of the private agreement between the ship and the pilot. In future legislation this situation should be dealt with and, in these circumstances, the Pilotage Authority should be allowed to fix in the District tariff the amount to be paid for obtaining such services from the Pilotage Authority's pilots. This money should be considered pilotage dues and should be recoverable as such, like payment for any other related services.

Chapter 7

FREEDOM OF PILOTAGE SERVICE UNDER PART VI C.S.A.

PREAMBLE

Under normal circumstances the pilotage profession, like any other, is exercised freely, including competition for clients who, in turn, have freedom of choice.

For the protection of both the users and those who offer their services the state has intervened either *proprio motu* or at the request of either party to provide a mechanism of control over the exercise of most professions and trades. Most liberal professions have obtained from the state the right to be incorporated in a professional organization, partly to promote the professional interests of their members but mainly to protect the public by ensuring a high standard of qualifications and professional ethics. Government intervention in the practice of a profession always means the imposition of some restrictions. The greater the degree of intervention the greater the diminution of basic freedoms, but on the other hand there is increased protection for all concerned. The pilotage profession has had the same experience: pilotage legislation has affected in varying degree any person's absolute right to offer his services as pilot, and any Master's or owner's free choice of the pilot he wishes to employ; in other words, the unhindered right to contract for pilotage services.

Aside from the duties and obligations imposed on the holder of a pilot's licence (which will be studied later in Chapter 8) Parts VI and VIA of the Canada Shipping Act deal with the extent to which the Government may intervene in the free exercise of the profession. The Act foresees five basic situations:

- (a) non-organized localities;
- (b) Pilotage Districts without the compulsory payment of dues;
- (c) Pilotage Districts with the compulsory payment of dues;
- (d) the designated waters of the Great Lakes Basin where there is compulsory pilotage;
- (e) the undesignated waters of the Great Lakes Basin where it is compulsory to employ a registered pilot under certain conditions.

The first situation has been dealt with earlier. The only legislation applicable in non-organized territories and the only measures of control over the exercise of the pilots' profession are contained in the Canada Shipping Act in its provisions of general application (vide pp. 33 and 40). Under the scheme outlined in Part VI, non-organized localities can not establish any form of administrative control over the licensing, qualifications and remuneration of pilots. To implement such measures requires the creation of a Pilotage District under the Act as well as the appointment of a Pilotage Authority. For such localities, Parliament has not deemed it advisable to intervene, even to the extent of enacting minimum basic qualifications for the pilots. This attitude is consistent with the basic philosophy of the present pilotage legislation, i.e., pilotage is merely a private service for the convenience of shipping. As seen earlier, this concept is no longer in keeping with today's realities.

However, even in areas where pilotage is not Government-controlled, some limitation on the free exercise of the profession can be imposed but only, as in any other profession, by virtue of civil agreements. For instance, the owner of wharf installations can forbid the use of his facilities unless berthing is handled by the pilots he provides, as in the privately-owned and privately-operated harbour at Port Cartier. The same situation exists at the Cargill Terminal at Baie Comeau. But the Cargill Co. makes its two pilots available for services in other parts of the harbour, in which case complete freedom of choice exists to take a pilot or not.

The second and third situations are the organizational systems provided in the basic pilotage legislation, i.e., Part VI C.S.A. These situations are studied hereunder.

The fourth and fifth situations, that is, compulsory pilotage and the compulsory employment of a pilot, occur only in the Great Lakes Basin, and are exceptions to the general rule provided in Part VI of the Act to cover exceptional circumstances which do not occur elsewhere. Part VIA is the equivalent of a special Pilotage Act to cover one particular situation. This system entails a greater degree of Government intervention in navigation to the extent that compulsory pilotage is imposed in certain areas. These two particular situations are dealt with at length in Part V of the Report entitled "Great Lakes Pilotage".

GENERAL RULES APPLICABLE TO PILOTAGE DISTRICTS UNDER PART VI

The freedom of shipowners and Masters in pilotage matters is affected to a certain degree every time a Pilotage District is created, and to a greater degree when the payment of dues is made compulsory.

Part VI of the Act lays down the following rules which are applicable to all Pilotage Districts that are governed by its provisions:

- (a) Acceptance of pilotage service is not compulsory (sec. 340).
- (b) Except in special circumstances pilotage of ships may be performed only by licensed pilots (subsec. 354(3)).
- (c) The Master has the right to choose his pilot.
- (d) Tariff is binding on both parties (secs. 341, 343 and 372).
- (e) Embarking a licensed pilot for the purpose of piloting a ship renders the ship liable to pay dues, whether or not the pilot's services as such are used (sec. 352).

The first rule makes it legally impossible to impose compulsory pilotage or to require a Master to embark a pilot because it would be ultra vires on the part of the Governor in Council (or anyone else) to do so under Part VI. For this reason new legislation (Part VIA) was necessary in order to legalize a departure from the rule in the special case of the Great Lakes Basin.

Outside the Great Lakes Basin, no shipmaster can be compelled to take a pilot on board, much less entrust navigational control to one. A Master can dispense with a pilot altogether and, if he embarks one, he may use his services partially, or not at all. A Master always retains legal command of his ship and always remains responsible for her navigation. Even though a pilot is entrusted with the "conduct" of a ship, the Master, or his representative, the officer of the watch, always has the right to supersede him (vide pp. 26-29).

Part VI merely ensures that the assistance of qualified pilots is available to Masters, who may employ them if they see fit. Whether or not a Master employs a pilot, the civil responsibility of the shipowner is not altered (subsec. 340(3)). The Government incurs no liability for any wrongful act or negligence of any pilot it has licensed and is liable in damages only for a wrongful act or the personal negligence of its Pilotage Authorities in the discharge of their licensing responsibilities, but not of any wrongful act or negligence on the part of the pilots in the performance of their duties. As explained earlier, there is no contractual relationship between a Pilotage Authority and a pilot or a ship; the only contract that exists pursuant to Part VI is between the pilot and the ship he has undertaken to pilot.

The second rule is laid down in subsec. 354(3), namely, in Pilotage Districts, pilotage of ships must be performed by licensed pilots only (the meaning of the term "ship" is studied in 3 *infra*). This is one restriction on freedom to contract that results from the creation of a licensing scheme. The reason for this restriction is not safety because (a) a ship may proceed without a pilot, (b) an unlicensed pilot may be employed in certain circumstances. The reason is that the licensing process would become an exercise in futility if ships, for whose convenience the selective process of

licensing was created, were allowed to hire licensed or unlicensed pilots indiscriminately. Furthermore, by guaranteeing licensed pilots regular employment the best candidates are attracted to the service and provided with the means to maintain their skill and knowledge.

Except in the case described in sec. 349 (in compulsory payment Districts the Master of a non-exempt ship which requires a pilot must display the approved signal and "facilitate the coming on board of the pilot") a Master or owner can hire whichever of the available licensed pilots he wishes. Equally, a pilot is at liberty to enter into a contract with any ship, provided he complies with any regulations which ensure his constant availability.

Subsec. 2(44) of the Act defines licensed pilot as "a person who holds a valid licence as pilot issued by a Pilotage Authority". This definition is completed by subsec. 333(3) to the effect that a licence is valid only within the limits of the Pilotage District for which it was issued, and even within a District there can be further restricted limits, shown on the licence, beyond which a pilot is considered unlicensed. For instance, in Prince Edward Island the rule is to limit a licence to a harbour and its approaches, e.g., a Charlottetown pilot is not licensed to pilot in Georgetown, and vice versa.

There are two exceptions to this rule. Pilotage may be performed by an unlicensed pilot:

- (a) when the Pilotage Authority has indicated to a Master that a licensed pilot is not available (subsec. 354 (1)(a));
- (b) in case of distress or in similar circumstances (subsec. 354(1)(b)).

The second exception is unambiguous but the first is out of context.

Formerly subsec. 354(1) corresponded, except for points of style, to sec. 46 of the 1873 Pilotage Act but in 1956 subsec. (1)(a) was amended. Prior to the 1956 amendment (4-5 Eliz. II c. 34) it read as follows:

"354. (1)(a) When no licensed pilot for such district has offered to pilot such ship, or made a signal for that purpose, although the master of the ship has displayed and continued to display the signal for a pilot in this Part provided, whilst within the limits prescribed for that purpose, and ...".

The pre-1956 text was in conformity with the limited scheme of control provided under Part VI and fitted in with the other provisions of the Act, *inter alia*, secs. 348, 349 and 363. The 1956 amendment is out of context because it imposes on the Pilotage Authority a new duty that presupposes powers it does not have and which, in effect, is detrimental to shipping in the context of the scheme of Part VI.

Such an amendment fits into a system where the Pilotage Authority has powers and responsibilities (lacking under the present legislation) to provide pilotage service (i.e. to despatch pilots) and thus be in a position to state

whether pilots are available or not. Under Part VI the Authority can do no more than pass regulations to require pilots it has licensed to be in constant attendance, and, if they fail, to implement these regulations by having them prosecuted. In the free enterprise system under Part VI, a ship is never obligated to send an advance request for a pilot: only a reasonable notice of expected time of arrival (ETA) is required in compulsory payment Districts from a non-exempt ship if it is desired to exempt her in case a pilot is not available. It is the licensed pilots' duty to be available and ready at all times if they wish to exercise the precedence privilege conferred on them by their licence.

Furthermore, as the subsection is now worded, there may be abuses because a ship is left at the mercy of the Pilotage Authority which could keep a Master waiting, if he requires a pilot, and if an unlicensed pilot is available, by delaying the reply to his request for a pilot. Formerly, the availability of pilots was a mere question of fact that could be ascertained by anyone; in the free enterprise system it was logical that if no licensed pilot offered his services, a ship should not be prejudiced on that account, and a non-licensed pilot could be hired. The matter is further complicated by the fact that only the Pilotage Authority can certify that a pilot is not available and, in Districts where the Minister is the Authority, the reply has to come from him or from the Deputy Minister in Ottawa. Although it is true that under subsecs. 327(2) or 329(p) this is one of the powers that may be delegated by by-law to local representatives, no such by-law exists in any Pilotage District.

Sec. 355 provides that an unlicensed pilot is to be superseded whenever a licensed pilot offers his services. It is believed that, unless the Master so wishes, this provision should not apply when an unlicensed pilot is hired because no licensed pilot is available. For instance, during a pilots' strike a ship should need no authorization to hire an unlicensed pilot and retain him on board.

Except in these two special cases, the employment of an unlicensed pilot renders both Master and pilot liable to a maximum fine of \$250 for each day of violation (sec. 356).

Sec. 356A purports to provide a third exception; the employment in the Great Lakes Basin of American pilots registered by American Authorities pursuant to Part VIA. At present, this provision is applicable in Canadian waters only in the Kingston District, which forms part of the Great Lakes Basin but was also created a Pilotage District under Part VI. Whether it is compatible under existing legislation to create a Pilotage District in the Great Lakes Basin under Part VI is studied in Part V of the Report "Great Lakes Pilotage".

Subsec. 354(3) contains no ambiguity: it is forbidden for a person not belonging to a ship, other than a licensed pilot, to act as pilot as defined in the interpretation section, namely, to conduct a ship. There is, however,

no legislation to prevent a Master from hiring a person not holding a pilot's licence to pilot a vessel which is not a ship (vide 3 *infra*) or to provide assistance to the ship's navigator if that person is not employed as pilot, i.e., does not "conduct" the ship, but is used only to advise on local knowledge. This is also apparent from the fact that Parliament used different language in the section of the Act dealing with an exempted ship which requires a pilot in a District where the payment of dues is compulsory: the Master is liable to a penalty if he employs "any person not belonging to his crew and not being a licensed pilot, to pilot or guide such ship . . ." (subsec. 348(b)). There appears to be no valid reason for this distinction. It is considered that in Pilotage Districts no person not a member of the crew without a pilot's licence should be employed to play any part in navigating a ship.

The third rule, to the effect that the Master is given, by the Act, the right to choose his pilot, has been studied in Chapter 4 (vide p. 71). There is only one exception to the rule: a non-exempt ship requiring a pilot in a compulsory payment District is obliged to accept the first pilot who offers his services (sec. 349).

Sec. 348 indirectly reaffirms the rule in the case of an exempt ship which, in the same circumstances, requires a pilot by stipulating that she will be liable to compulsory payment only if she does not accept the service of any of the pilots who offer their services in reply to her signal, but the Master retains his right to choose a pilot from those who answer his signal.

The fourth rule, i.e., that the tariff is binding on both parties, needs no further amplification (vide C. 6, pp. 133-136) *supra*). The tariff is the only valid pecuniary consideration of a pilotage contract, it can not be varied by private agreement. Pilotage dues established in the tariff are a debt payable by a ship to the pilot (or the Pilotage Authority if payable to it). Secs. 343 and 341 make the owner and Master co-debtors with the ship for payment and also the consignee or agent if he "has sufficient moneys in his hands received on account of such ship".

The fifth rule is that pilotage dues are owed and must be paid once a pilot is "taken on board" (sec. 352) for the purpose of piloting a ship, even if the Master does not make full use (or even any use) of his services to conduct the ship or to give advice, always provided that a pilot was available and fit to perform his duties. A natural consequence of a contract for services is that if a contractor is prevented by the other party from performing his obligations (provided he is willing and able to do so), the pecuniary consideration of the contract is payable. Sec. 352 of the Act stipulates that a pilotage contract has taken place when the pilot is taken on board. The charge is based on the applicable items in the tariff and, if the rate is for a full trip, the full dues are owed since neither party can vary the rates provided in the regulations.

Dues are also payable by a ship that can not be boarded due to existing circumstances but, when such ship is led by a pilot in another ship or in a boat, a pilotage service has been provided (sec. 353). A pilot may be prevented from boarding by high seas and unfavourable weather conditions, e.g., at Triple Island off Prince Rupert, the northern boarding station in the B.C. District.

However, the Act makes no provision for a shore-based pilot leading a ship in by radiotelephone, radar or other electronic means, as is done in some ports in Holland when, due to stress of weather, pilots can not board or even approach incoming ships. Scientific progress made this procedure possible, and the right to make use of it in special circumstances should not be denied because no statutory provision exists to authorize it.

THE COMPULSORY PAYMENT SYSTEM

Part VI of the Canada Shipping Act provides that in certain Pilotage Districts specified ships are required to pay pilotage dues, whether or not they employ a pilot, i.e., the compulsory payment system. This requirement is based on Canadian pilotage legislation of 1873, copied from the 1854 legislation of the U.K. which consisted of a partial compulsory pilotage system in that ships were not prevented from navigating without a pilot but were merely penalized if they failed to employ one. U.K. law has not changed in this regard (*British Shipping Laws*, Vol. II, Temperley, 1963 edition, para. 1310). In pre-Confederation days the Quebec Trinity House Act, as amended in 1849, provided for compulsory pilotage, a Master being obliged to give a licensed pilot charge of his ship under pain of a fine. This resulted in the Canadian courts refusing to hold a ship's owner responsible for the acts of Quebec District pilots (in re *The Lotus*, Clark, 1861, 11 L.C.R. 342).

In its first general pilotage legislation (the 1873 Pilotage Act) the Federal Parliament introduced a system similar in substance but under another name: the compulsory payment of dues. The Act took great care to make it clear that pilotage itself is in no way compulsory and that, despite the disguised fine it imposes, the normal civil consequences of a free pilotage system ensue. It stipulated these consequences in the Act by making the owner always responsible for the acts of a licensed pilot in charge of his ship, whether or not compulsory payment was in force (now sec. 340). The Act did attain its aim because the courts immediately reversed their former stand and held the owner responsible for the acts of the Quebec pilots, despite the fact that the payment of dues was compulsory, as shown by the following decisions:

"Held: The law imposing compulsory pilotage having been repealed, the liability of shipowners for acts of pilots in charge of their vessels revived" (Vice-Admiralty Court 1875, *The S.S. Quebec v The Charles Chaloner*, 19 L.C.J. 201).

"Compulsory pilotage having been abolished for a pilotage district, pilots are legally considered the agents of the owners of the ship, and the latter are therefore responsible for the acts of the pilot and for his negligence" (Exchequer Court, Quebec Admiralty District, 1897 Q.R. 12 C.S. 37 *The Bell Telephone Company v The Rapid*).

In Canadian legislation, the penal sanction for violating the compulsory payment system is not called a fine (the word is avoided) but by definition it is a fine or, at least, what is now called a penalty, i.e., a fixed, invariable sum of money becomes due, not as a result of a contractual obligation, but as a result of the provisions of the law when the conditions therein mentioned apply.

The system is not intended to promote the safety of navigation or to assure the necessary funds to operate the service, but merely to encourage ships to take pilots in order to provide the constant practice the pilots need to maintain and improve their skill and knowledge and, at the same time, to furnish them an adequate income. This was also the aim of the former compulsory system in Quebec, as indicated in an 1864 case (*Ex parte, Chrysler; Simard v Corporation of Pilots* (14 L.C.R. 209); "with a view to increase the activities and usefulness of the pilot".

As seen earlier (vide C. 3, pp. 59 and ff.), it is the exclusive prerogative of the Governor in Council, pursuant to sec. 326 C.S.A., to establish the system in any Pilotage District, except Quebec and Montreal where it is not permissible under present legislation. The Governor in Council has imposed the compulsory payment system in all Districts established under his authority with the exception of the District of Prince Edward Island. The Pilotage Authorities of the Districts of Quebec and Montreal have continued to enforce the system, as if the law, as far as these Districts are concerned, had not been amended in 1934.

The system is defined in sec. 345 and subsec. 357(1). Situations of exception are dealt with in secs. 346, 347 and subsec. 357(2) (exemptions), secs. 348 to 351 (inward voyage situations) and in subsecs. 329(d), (e) and (f) (pilotage certificates).

Sec. 345 and subsec. 357(1) provide that the compulsory payment system applies only, (a) to ships, (b) that navigate, or are removed from place to place by the Master, (c) within the limits of a District, (d) unless the ship qualifies for one of three exceptions, i.e.,

- (i) exemptions;
- (ii) is navigated by one of her officers who holds a valid pilotage certificate;
- (iii) unavailability of a licensed pilot on an inward voyage.

The third condition (c) is clear enough. It conforms to the scheme of organization provided under Part VI whereby licensed pilots and an official tariff are available only in organized territories, that is, in Pilotage Districts.

Conditions (a) and (b) seem self-sufficient at first sight, but they have given rise to contention and leave much to be desired. The first deals indirectly with exclusions (not exemptions) by indicating to which type of ship the legislation applies; the second determines the type of pilotage services that are affected by the compulsory payment system. Any service that may be rendered by a pilot, but that does not entail navigation or the moving of a ship, does not come under the application of compulsory payment. For instance, dues could not be collected from a ship because a Pilotage Authority was of the opinion that, under the circumstances, it would have been advisable to assign a pilot to a ship as security watch. Dues would not be payable, even if a person not holding a licence had been posted by the Master because this is not a case where the employment of a person without a pilot's licence is prohibited (sec. 354).

The C.S.A. makes it clear that only ships are subject to the compulsory payment system. This distinction is also in keeping with the basic organization provided by the Act because pilotage is intended for ships only, which is borne out by its context. *Inter alia*, one of the requirements to meet the statutory definition of "pilot" is to have the conduct of a ship (subsec. 2(64)). In Pilotage Districts, a person not holding a pilot's licence may "pilot a ship" under certain circumstances (sec. 354). Despite the statutory definition, there has always been contention about what constitutes a "ship" for pilotage purposes.

Meaning of "ship". For the purposes of Part VI, the Act gives "ship" a non-limitative and ambiguous definition (subsec. 2(98)):

"'ship' includes every description of vessel used in navigation not propelled by oars".

Before the 1934 Act, "ship" was somewhat further qualified by opposing it to "boat" which was defined as meaning:

"Every description of vessel used in navigation not being a ship" (sec. 2, 1873 Pilotage Act, subsec. 391(a), 1927 C.S.A.).

The term "vessel", although not defined, was the generic term that included both ships and boats. Pilotage legislation clearly applies exclusively to ships.

The definition of "vessel" came into pilotage legislation indirectly in the 1934 Act when the specific interpretation sections that formerly appeared at the beginning of each Part of the Act were amalgamated into one general section at the beginning of the Act itself. The present definition is found in subsec. 2(111):

"'vessel' includes any ship or boat or any other description of vessel used or designed to be used in navigation".

It is considered that the former situation has not altered and that vessel still remains the generic term. It includes three types of floating objects: (a) ships, (b) boats, and (c) other objects that are not included in the definition of either ship or boat, but which are used, or designed to be used, in navigation. Furthermore, the term "vessel" is used in Part VI only when a wider meaning than "ship" is intended, e.g. "pilot vessel" (secs. 364 and ff.) which is defined as meaning "any ship or boat employed in the pilotage service of any pilotage district" (subsec. 2(65)). This is further borne out by the text of sec. 353 which begins as follows: "Where any vessel having on board a licensed pilot leads any ship . . .". However, the corresponding section of the 1927 C.S.A., sec. 444, reads: "If any boat or ship having on board a licensed pilot leads any ship . . .".

The definition of "ship" is a verbatim reproduction of sec. 2 of the 1873 Pilotage Act which, in turn, was derived from the U.K. Merchant Shipping Act of 1854. Both in the U.K. and Canada the definition has remained unchanged ever since.

At first sight the meaning of the statutory definition of ship seems clear, except for the fact that it is non-limitative and the requirement that a ship must have her own motive power is indicated only indirectly and ambiguously. The distinction that separates a ship from a boat is that a ship is essentially self-propelled whether by sail, steam or other type of motive power. It does not cease to be a ship because, for one reason or another, motive power is not in use, or is not capable of being used (e.g. engine breakdown) unless the condition is permanent (e.g. a sailing ship intentionally deprived of its masts, a motor vessel whose engine has been permanently removed, a ship wrecked beyond repair). Conversely, boats are those vessels which, although used in navigation, have no motive power of their own for navigational purposes but depend on extraneous power, whether human power, through the use of oars, or power provided by a ship such as towing or some other external means. Since pilotage legislation is applicable only to "ships", floating objects such as non self-propelled barges, dredges and scows, rafts, cribs and booms, moved through the water by extraneous means, are automatically excluded from its scope of application.

As was to be expected, the interpretation of the meaning of the term "ship" has given rise to much controversy because it limited the application of pilotage legislation. Court decisions, both in the U.K. and Canada, have often been contradictory. The main decisions in Canada are the following:

- (a) In 1879, it was held that a dredge was not a ship or a vessel because it had no motive power of its own and was not adapted to be an instrument of transportation (1879, 15 C.L.J. 268 (Ont.) in re *The Nithsdale*);
- (b) In 1894, in Nova Scotia, it was held that a barque which had been wrecked and beached in Newfoundland and later condemned

- and sold as a wreck could not be classified as a ship as defined in the Pilotage Act and therefore when it entered Halifax Harbour under tow it was not subject to the payment of pilotage dues (1894, 26 N.S.R. 333 (C.A.) *Halifax Pilot Commissioners v Farquhar*);
- (c) In 1902, the Exchequer Court held that a vessel, in this instance a coal barge of about 1,000 tons register that had no motor power of itself, either by sail or by steam, when proceeding in charge of a tug is not a ship as defined in pilotage legislation and therefore is exempted from the payment of pilotage dues (8 Ex. C.R. 54, 79, *Corporation of Pilots v the ship Grandee*);
 - (d) In 1908, it was held that a "roller boat" was a ship, despite the fact that it had no motive power, because towing alone was not enough to conduct it. It was fitted with a rudder and a man had to be aboard to steer it. The point of contention was the jurisdiction of the Admiralty Court in the case of a collision between two vessels, one of them being the "roller boat". (*Turbine Steamship Company v Knapp Roller Boat*, 1908, 12 O.W.R. 723);
 - (e) In 1909, it was held that a raft is neither a ship nor a vessel for the purpose of enforcing a lien before the Admiralty Court in favour of a person not in possession (13 O.W.R. 190, affirmed 14 O.W.R. 639 (C.A.) *Pigeon River Lumber v Mooring*);
 - (f) In 1910, the Privy Council held that coal barges, about 440 tons each, with no motive power of their own, except sails that would enable them to run before the wind, but not so fitted to permit safe navigation, as for fully rigged sailing vessels, and towed by tugs or steamers in and out of the harbour of Saint John, N.B. were ships, and therefore liable to pay pilotage dues (1910, A.C. 208, *Saint John Pilot Commissioners and Attorney General for Canada v Cumberland Railway Co.*);
 - (g) In 1913, it was held that a boom of logs was not a vessel (1913, 16 Ex. C.R. 305, in re: *Paterson Timber Co. v SS. British Columbia*);
 - (h) In a Court of Formal Investigation decision rendered Sept. 30, 1966 in the case of the dredge *Manseau 101* by Mr. Justice Noel of the Exchequer Court, it was held that the dredge and the two tugs moving it constituted "a navigating floating mass" (*une masse flottante navigante*). Since a dredge and tugs are a *ship* as defined in the first part of subsec. 2(98) C.S.A., the Court of Formal Investigation had jurisdiction to enquire into the circumstances of the sinking under secs. 551 and 560.

To limit the application of pilotage legislation to "ships" was consistent with the principles on which the former pilotage legislation was based, but it is now an unrealistic restriction. Originally, pilotage was conceived as merely a private service (and in fact was) for vessels whose Masters did not possess the necessary local knowledge for safe navigation, i.e., sea-going vessels, all of which were ships. Boats and composite navigation units, such as tugs and scows, were generally engaged in well-known local navigational waters and did not require pilotage service. Hence, they were not made subject to the application of pilotage legislation. When a composite navigation unit is composed of a ship, assisted or moved by tugs, the ship alone is considered, and the act of navigation is properly deemed to be the act of the ship, whether or not the ship's engines are used.

This last point has been the subject of litigation. The courts decided that, for navigational purposes although not for the purpose of computation of dues (*Saint John Pilotage Commissioners and Attorney General for Canada v Cumberland Railway Co.* above cited), a tug and a ship comprise only one navigation unit, because they both carry out a single act of navigation directed by one person. Moreover, when so directed by one pilot, both vessels are under the charge of that pilot:

- (a) In 1873, it was held by the Privy Council that the pilot on board a ship in tow has control over the tug and bears responsibility for its negligence (1873 L.R. 5, P.C. 308, *Smith v St. Lawrence Towboat Company*);
- (b) In 1881, it was held that a tug towing a ship is bound to obey the orders of the pilot of the ship, whose employment is compulsory (1881, 6 A.C. 217, *Spaight v Tedcastle*).

But such limited scope of application is now too restrictive and does not meet the requirements of a pilotage service that has developed into one required in the public interest to ensure the safety of navigable channels. Any vessel that is being navigated and may become a menace to the safety of navigation is now the Pilotage Authority's concern. Therefore, it is considered that to be realistic the scope of future pilotage legislation should be enlarged to provide the Pilotage Authority with the means and powers to assure safety of navigation, wherever required, by extending its control over every water-borne object under navigation in its District. These powers should be under proper legislative and administrative controls to prevent abuses and arbitrary decisions. This aim could be achieved by using the generic term "vessel" instead of "ship", and by giving it a definition broad enough to encompass water-borne objects being navigated as a unit whether they move under their own power, or are being moved by other means. For the purpose of pilotage legislation, whether it concerns navigation, exemptions or tariff, a composite navigation unit should be considered one

vessel, irrespective of the number of its components, with the independent act of navigation being the determining factor. The question is covered in greater detail in C. 7, p. 233 and in a specific Recommendation.

Meaning of "navigate". As seen from the quoted court decisions, the means of the term "navigate" has posed serious problems of interpretation in certain cases. The situation was further complicated in 1934 by the introduction of the provisions of the present subsec. 357(1), apparently in an attempt to clarify the interpretation.

Prior to the 1934 Act, the extent of the compulsory payment system was defined only by the provisions of the section corresponding to the present sec. 345. Therefore, the key question is, "When is a ship considered to be navigating?" The expression "to navigate" used in sec. 345 seems to have a meaning wide enough to cover all possible movements of a ship under her own power, whether within a harbour, or between points inside or outside district limits, or between ports within the limits of a District. It might have been debatable whether a ship was navigating when it was moved by outside means, but the preponderance of the jurisprudence previously cited was in the affirmative (and rightly so), provided the ship had not ceased to be a ship, and was used for transportation purposes.

However, since 1934 with the introduction of subsec. 357(1) the Act differentiates between a ship being navigated within a Pilotage District (sec. 345) and a ship being "removed from one place to another" within a District by a Master (sec. 357). Confusion results, because if a Master "removes" his ship from one place to another within a Pilotage District, even using the ship's motive power alone, he is not navigating. If he were, subsec. 357(1) would be either meaningless or superfluous. According to the rules of interpretation, when the legislature enacts a special provision and uses different language, it is because it is referring to a distinct situation; here it must be inferred that when the legislature added subsec. 357(1) in 1934 it wanted to deal with a situation not already covered in sec. 345.

The origin of subsec. 357(1) C.S.A. can be traced to the Pilotage Act of the U.K. It appears that in mariners' language there are two types of ship movement: navigation properly speaking, i.e., voyages or trips, and the movements of a ship within a harbour which are referred to in Canadian pilotage By-laws as 'movages'. The corresponding section in the Pilotage Act of the U.K. differs from subsec. 357(1) in two material aspects: (a) it deals only with a movement of a ship within a harbour; (b) it duly relates such a movement to the general expression of navigating a ship. In this way the two types of ship movement are not opposed but made complementary. The British section reads as follows:

"32.(1) A ship while being moved within a harbour which forms part of a pilotage district shall be deemed to be a ship navigating in a pilotage district, except so far as it may be provided by by-law in the case

of ships being so moved for the purpose of changing from one mooring to another mooring or for being taken into or out of any dock; provided . . . ”.

The origin of this section is explained in a footnote under Pilotage Act, sec. 32, p. 596, in Temperley's *Merchant Shipping Acts*, fifth edition, 1954, as follows:

“Under the repealed M.S.A., 1894, s. 596, an unqualified pilot might take charge of a ship for the purpose of changing her moorings or taking her into or out of any dock in cases where the act could be done without infringing the regulations of the port or any lawful orders of the harbour master. Thus, an unqualified pilot might conduct a vessel anywhere within the limits of the Port of London for pilotage purposes when engaged in changing her moorings.”

The only logical explanation is that in 1934 it was intended to remove any possible doubt and to indicate clearly that all navigation that occurred within a harbour, whether with or without a ship's own engines, was subject to compulsory payment. If this is correct, the resultant confusion is due to another drafting error.

But if this was the intention, it is unfortunate that the phraseology of the corresponding British section was not followed. Instead, use was made of an existing subsec. (447(1), 1927 C.S.A.) which dealt with a situation similar to the one prevailing on the Thames River where “navigation” could be related to a pilotage trip on the river as opposed to a movement within the Port of London itself. This could have been achieved by replacing the words “from one place to another within the Harbour of Quebec” by “from one place to another within any port or harbour situated in a pilotage district”. Instead, the phrase was replaced by “from one place to another within any pilotage district”. Obviously, only the port type Pilotage District was envisaged and the amendment becomes illogical when applied literally to river and coastal Districts. For instance, a trip between Chicoutimi and Quebec or between Vancouver and Prince Rupert would fall under sec. 357 and not under sec. 345, with the result that a ship engaged in these trips would not be considered as navigating but as effecting a movage and, furthermore, only the Master, not the ship or the owner or the agent, would be liable for the compulsory payment of dues.

The amendment, however, was indicated and despite the interpretative confusion it creates it serves its intended purpose in practice because it makes all movements of ships within district limits, whether or not by ship's motive power, and whether within a harbour or a District, subject to the compulsory payment system, directly or indirectly.

By-law definition of “vessel”. Since many questions remained unanswered, the Pilotage Authorities tried to elucidate them by substituting in the regulations a redefined term “vessel” for the term “ship”, and by making

the compulsory payment system applicable to vessels so defined. The term "vessel" is defined in the various District By-laws in three different ways:

- (a) "vessel" means "every sort of ship in tow or otherwise" (vide By-law of Botwood, subsec. 2(j), British Columbia, subsec. 2(n), Humber Arm, subsec. 2(j), Port aux Basques, subsec. 2(j), Sheet Harbour, subsec. 2(i)).
- (b) "vessel" means "every sort of ship in tow or otherwise, except an undecked barge that has no living accommodation and that is not self-propelled" (vide By-laws of Churchill, subsec. 2(f), P.E.I., subsec. 2(i), and Richibucto, subsec. 2(k) which omits "and that is not self-propelled"). The term "barge" is not defined.
- (c) "vessel" means every sort of ship, in tow or otherwise, except a scow.

"scow" means any undecked barge having no living accommodation (vide By-laws of Bathurst, subsec. 2(m), Bras d'Or, subsec. 2(e), Buctouche, subsec. 2(m), Caraquet, subsec. 2(k), Cornwall, subsec. 2(l), Halifax, subsec. 2(l), Miramichi, subsec. 2(m), Montreal, subsec. 2(p), New Westminster, subsec. 2(m), Pictou, subsec. 2(k), Pugwash, subsec. 2(k), Quebec, subsec. 2(n), Restigouche, subsec. 2(m), Saint John, subsec. 2(m), Shediac, subsec. 2(l), and Sydney, subsec. 2(n). The term "barge" is not defined).

To amend or limit by regulation the statutory definition of the terms "ship" and "vessel" is illegal because this power is not included in the powers delegated to Pilotage Authorities by the Act. These definitions limit or extend the application to the various sections of the Act containing the terms, especially in the present case which involves the compulsory payment system and its exceptions. However, the mere fact that every Pilotage Authority found it necessary to redefine vessel in relation to its movement indicates that the statutory definition of ship and the meaning of the verbs "navigate" and "remove" used in secs. 345 and 357 are inadequate for pilotage purposes today. It is also an indication that future legislation should adopt realistic statutory definitions for these terms to meet the requirements of the pilotage service and pilotage organizations.

Furthermore, the terms "vessel" and "ship" are misused in these definitions because "ship" is made the generic term. This practice existed prior to the 1934 Act, e.g., the 1915 Quebec District By-law (Ex.1456n) always used *vessel* instead of *ship*. The definition of vessel as in (c) above appeared in the 1928 Quebec District By-laws (Ex. 1448) when regulation definitions were first introduced. This indicates that *ship* had already lost the precise

meaning it had when it was first introduced in pilotage legislation. The reference to "scow" in the definition indicates that, in practice, the application of pilotage legislation had been extended to boats, probably in view of the confusion created by some court decisions, but mostly by the requirements of the service at that time, especially on the St. Lawrence River.

By-law definition of "movage". The By-laws of all Districts, except Montreal, contain another controversial definition: *the term "movage"*. It is defined as follows (with a slight variation in the Saint John, N.B. By-law):

"'Movage' means the moving of a vessel within a harbour from one anchored or moored position to another but does not include the warping of a vessel from one berth to another solely by means of mooring lines attached to the shore unless a pilot is employed".

The Montreal By-law does not contain the definition despite the fact that the term "movage" is used in its tariff. This stereotyped definition was included in the By-laws without adaptation to local requirements except in Saint John, N.B. where, by a 1965 amendment, the words "within a harbour" were replaced by "within the District".

The legality of this definition is questionable if it is intended to restrict the application of sec. 357 to movements of ships within a harbour. The definition has been superfluous since the inclusion of the present subsec. (2) by an amendment in 1956, which had the effect of making a relative exemption of any movement effected solely by mooring lines. The use of different terms in the regulation definition to express the same thing as in the Act may cause problems of interpretation. Prior to the 1956 amendment, the restriction contained in the regulation definition was realistic, although illegal, and the 1956 amendment remedied the situation that the definition tried to correct. However, the regulation definition would be legal if it were only a means to define a type of pilotage service for the purpose of fixing rates, i.e., the movement of a ship from one place to another within a harbour by any means when a pilot is employed. This would not be objectionable in view of a Pilotage Authority's discretionary power to fix rates (subsec. 329(h)), as seen in the preceding chapter. If this was the purpose of the definition it should be contained in the tariff itself. But the present By-law definition goes much further and, therefore, is irregular to say the least. Furthermore, the use of the term "movage" is now objectionable as a possible source of confusion, on account of the wording of sec. 357, but as the term is now accepted in Canada and expresses a distinction in ships' movements that must be made, it is considered that the term "movage" should be incorporated and defined in the Act.

EXCEPTIONS TO COMPULSORY PAYMENT

A. EXEMPTIONS—FIRST EXCEPTION

1. *Nature and extent*

Under the scheme of exemptions provided in Part VI, ships that might be a safety risk on account of their size or because their Masters lack local knowledge do not enjoy any exemption from the payment of pilotage dues. Thus safety of navigation is automatically increased although it is not the governing factor.

The scheme of exemptions provided in secs. 346, 347 and subsec. 357(2), divides ships into three categories:

- (a) exemption denied;
- (b) absolute statutory exemption;
- (c) relative exemption.

The Act does not provide any exemption for the following classes of ships:

- (a) foreign ships over 250 net tonnage, that is, those for which the pilotage service was primarily established (except American local traders as indicated below);
- (b) ships registered in Her Majesty's dominions which do not fall within one of the four exceptions provided in subsecs. (d), (e), (f) and (i) of sec. 346. These non-exempt ships are also ocean-going ships for which the pilotage service was established.

The present Act provides the following ships with an absolute statutory exemption that can not be withdrawn by a Pilotage Authority:

- (a) ships belonging to Her Majesty (subsec. 2(100)) and to the Government (subsec. 2(30)) except those entrusted for operation and management to any Crown agency (346(a)(b));
- (b) ships registered in any part of Her Majesty's dominions:
 - (i) if engaged in fishing (346(i));
 - (ii) if employed in salvage operation (346(d));
 - (iii) if not over 250 tons register (346(f));
- (c) ships of any nationality entering a harbour for refuge (346(g));
- (d) United States ships operating in a Pilotage District above Montreal and trading on the Great Lakes or between ports on the Great Lakes and on the St. Lawrence River, even if they make an occasional voyage to the "maritime provinces of Canada" (now an ambiguous, undefined term) (346(ee)). This exemption is the result of an amendment rendered necessary to assure similarity of treatment to Canadian and American ships following the opening

of the St. Lawrence Seaway and the introduction of joint Canada-United States pilotage arrangements on the Great Lakes (Bill C-98, 1961, Clause 15, which will become 9-10 Eliz. II c. 32). The result, however, is that American ships receive preferential treatment in that they enjoy an absolute exemption while their Canadian counterparts enjoy only a relative exemption as indicated hereunder in the following paragraph under (b) (ii).

The third group are those whose exemption is left to the discretion of each Pilotage Authority. They are divided into two classes:

- (a) those to which the Pilotage Authority is empowered to grant an exemption:
 - (i) small foreign ships not over 250 net tonnage by class or size, at the discretion of the Pilotage Authority with the approval of the Governor in Council (346(c));
 - (ii) foreign hospital ships or ships of war at the sole discretion of the Pilotage Authority (346(h)) which discretion is exercised as each case arises through an administrative order (vide C. 8, p. 298);
- (b) those enjoying a relative statutory exemption which can be withdrawn by the Pilotage Authority through regulations either completely or partially, either as to the amount of the dues or as to the category or class of the steamship concerned:
 - (i) the exemption granted to every ship by subsec. 357(2) for a move effected solely by means of her mooring lines;
 - (ii) the exemption granted to regular traders pursuant to subsec. 346(e). These regular traders normally do not need the services of pilots and usually dispense with them. However, they benefit indirectly from organized pilotage, in that the service is a safety factor when foreign ships are provided with pilots, or, at times, directly when they employ pilots for their convenience as relief Masters when transiting a long section of pilotage waters like the St. Lawrence River or when navigating under exceptionally adverse conditions. To enjoy this relative exemption the ships concerned must meet three conditions:
 - (A) to be "steamships"; if they do not fulfill the statutory definition of steamship (subsec. 2(105)) and are not otherwise exempted they are subject to the compulsory payment of dues. Subsec. 2(105) defines steamship as "any ship propelled by machinery, and not coming within the definition of sailing ship"; and sailing ship is defined

(subsec. 2(93)) as “a ship propelled wholly by sails, and a ship principally employed in fishing, not exceeding 200 tons, gross tonnage, provided with masts, sails and rigging sufficient to allow her to make voyages under sail alone, and that, in addition, is fitted with mechanical means of propulsion other than a steam engine.”;

- (B) they are registered in one of Her Majesty’s dominions;
- (C) they are local traders falling into one of the following categories:
 - (i) local traders employed in any one port or between ports in the same province (346(e)(i));
 - (ii) coastal traders divided into two main groups: those on the East Coast employed in voyages in any waters between New York City and Hudson Bay, on the St. Lawrence or the Great Lakes (346(e)(ii) and (iii)); those on the West Coast employed in voyages in any waters between San Francisco in the south and Alaska in the north (346(e)(iv)).

The wording of sec. 347 gives rise to controversy whether the right of the Pilotage Authority to withdraw statutory exemptions applies only to the cases enumerated in subsec. 346(e), or to any ship enjoying any one of the other exemptions, provided the ship happens to be a steamship. The point of contention is the use of the word “section” in the fifth line of sec. 347 instead of the word “subsection”. There can be no doubt that sec. 347 applies only to the cases listed in subsec. (e), otherwise the reference to this subsection in the second line becomes meaningless; furthermore, when the word “section” is considered in its context, there is no possible ambiguity, i.e., “steamship employed as specified in that section”. Hence in sec. 346 it is only in subsec. (e) that mention is made of a specific employment of steamships. Furthermore, the other interpretation would lead to the absurd conclusion that a Pilotage Authority would have power to withdraw exemptions from Crown or Government vessels, from salvage ships, fishing vessels, and small vessels registered in Her Majesty’s dominions, if they happened to be steamships, but would be powerless to do so if they happened to be any other type of ships. This again is the result of poor drafting at the time of the 1934 revision. Sec. 417 of the 1934 Bill did not contain this error but it was the result of an amendment made during debate (probably with the intent of clarifying the text) to make sure that sec. 347 applied only to subsec. (e) of sec. 346, *inter alia*, the words “notwithstanding anything contained in paragraph (e) of the last preceding section” were added

but the rest was left unchanged. Sec. 417 of the Bill, prior to amendment, read as follows:

"417. The pilotage authority of any pilotage district may, notwithstanding anything contained in the last preceding section, from time to time, determine with the approval of the Governor in Council, whether any, and which, if any, of the steamships employed, as in the said preceding section specified, shall or shall not be wholly or partially, and, if partially, to what extent and under what circumstances, exempted from the compulsory payment of pilotage dues".

It is a drafting error not to use the same terms to make the same reference, especially when the two references appear in the same provision and in the same sentence. Different wording normally connotes a different meaning, unless the contrary appears from the text and context as is the case here. If this provision is to be kept in new legislation, it should be reworded in such a way as to dispel any possible ambiguity.

It is considered that the distinction between a ship and a steamship in sec. 346 is a relic from past legislation which met a situation that no longer exists. The distinction can be traced back to the first Canadian pilotage legislation where sec. 57 of the 1873 Pilotage Act distinguished between exemptions for "ships" and "ships propelled wholly or in part by steam". The distinction was realistic at that time because most ships were under sail and lacked in confined waters the manoeuvrability of the steamships which were beginning to compete with sailing ships. Unless sailing ships were registered in the Dominion of Canada and were not over 250 tons, they were not exempt; their steamship counterparts were exempt if they were local traders. Since this situation no longer exists, it is considered that the distinction should be dropped.

It is interesting to note that in the proposed amendment to sec. 346 in Bill S-3 (unpassed), the term "ship" replaced "steamship" in subsec.(e).

It was charged that the provisions of sec. 346 are discriminatory in that flag is a determining factor. In the 1934 Act, exemptions for local and coastal traders were uniformly limited to steamships registered in Commonwealth countries. This apparently is discriminatory because it violates certain ancient treaties with other nations (vide Bill S-3, Senate Debates, Ex. 1191). When Bill S-3 was considered, an attempt was made to correct the situation by removing from this section the restriction on register but the Bill was not passed and no further attempt was made to amend the section except in the 1961 amendment, subsec. 346(ee) (9-10 Eliz. II c. 32), which solved the urgent problem of American vessels on the Upper St. Lawrence River and in the Great Lakes Basin. It is agreed that in legislation where the criterion for imposing pilotage on ships is safety of navigation, the flag question is absolutely irrelevant. The criterion for exemption should be the relative dangers that pertain to a given route, including the intensity of traffic, ship's characteristics such as size and manoeuvrability and the

competence of Masters and officers in local navigation. Without delving into the extent to which these ancient treaties¹ might restrict the powers of Parliament to deal with certain aspects of navigation as far as countries that are parties to these treaties are concerned, a cursory study reveals that the purpose of the treaties is to prevent discrimination against these countries as to their right to navigation and the tolls, duties and charges they are to pay. In these respects their ships are to receive the same treatment as Canadian ships. No one could seriously argue that the sections of the Canada Shipping Act and of the National Harbours Board Act which authorize the Governor in Council and the National Harbours Board to modify the rule of the road or to establish traffic control, as warranted by local circumstances, are a violation of liberty to navigate as guaranteed by these treaties. These are safety measures for the protection of the public as well as the individual ships that have to comply with them. Whenever compulsory pilotage is imposed for reasons of safety it is also a safety measure. Compulsory pilotage and compulsory payment of dues may well be considered restrictions on the right to navigate in a system where pilotage was conceived only as a private service to shipping, but it can not be true where pilotage is conceived as a public service for the safety and protection of Canadian waterways and maritime traffic. The resulting lack of flexibility has created problems which have been settled, in part, by illegal agreements. For instance, the Vancouver Chamber of Shipping has made an agreement with the B.C. pilots to the effect that American ferries plying between a Puget Sound port and a B.C. port are exempt from the compulsory payment of dues, as are American ships merely in transit through B.C. District waters. However, the pilots have refused to extend the agreement to ferries plying between an Alaskan port and a B.C. District port or a New Westminster District port. In both cases, the Pilotage Authority abided by the pilots' decisions. It does not demand payment of dues by ferries from Puget Sound ports but enforces payment by American ferries sailing between Alaska and Canada. Equally, ships in transit which do not call at a Canadian port are not charged pilotage dues unless they employ a pilot.

In 1953, as a result of the controversy following the refusal of an American steamship company to pay dues for its ships engaged in coastal operations on the Pacific Coast, it was suggested that an unofficial exemption could be legally granted by providing in the tariff, under subsec. 329(h), a nominal fee for that type of American ship. Subsec. 3(b) of the Saint John Pilotage District 1934 By-law was cited as a precedent. It was specially drafted to exempt a line of United States passenger steamships, on a regular

¹A list of sample clauses concerning Canada's obligations with respect to pilotage and a list of the treaties dealing with navigation in force between Canada and the U.S.A. are appended to Proceedings of Senate Committee on Transport and Communications, Bill S-3; February 25, 1959, pp. 235-239 (Ex. 1191).

run between Saint John, Boston and New York, by providing a nominal fee if the services of pilots were dispensed with (Ex. 1159). The proposal was not factually correct. The Saint John District By-law was not a precedent; it was in conformity with the legislation then in force but since repealed. Subsec. 457(c) of the 1927 C.S.A. exempted steamships of any nationality that were local or coastal traders on the St. Lawrence and on the eastern seaboard.

Apart from the relative exemptions listed above, a Pilotage Authority has no right to modify the scheme of exemptions defined in the Act either by granting additional exemptions or withdrawing any of those over which it has no power.

It is illegal to try to circumvent the law and to grant an unauthorized exemption either by not providing a rate for a class of ship, or a type of voyage, or by providing a lesser rate to be paid by non-exempted ships if a pilot is not employed. Pursuant to secs. 345 and 347, in cases where the payment of pilotage dues applies whether or not the services of a pilot are used, the amount of dues that ought to be paid is the same.

The provisions of sec. 347, whereby a lesser charge can be made when a pilot is not hired, is not an exception to the foregoing rule because sec. 347 applies to ships for which normally the compulsory payment system does not exist, that is, those enjoying a relative exemption. Subsec. 345(b) specifies that compulsory payment does not apply to exempted ships. Sec. 347 empowers a Pilotage Authority to withdraw a relative exemption, either totally or in part, for the steamships concerned. However, such a partial withdrawal does not empower a Pilotage Authority to set a different scale of pilotage dues for such ships, but only to provide to what extent the existing scale is to apply. If subsec. 329(h) was to be interpreted as giving a Pilotage Authority power to provide a different scale when no pilot is hired, it would also be permissible for a Pilotage Authority to provide a higher rate, which would conflict with the provisions of sec. 347.

It would also be illegal to fix a nominal price even though the amount to be fixed in the regulations is left to the discretion of a Pilotage Authority. This would be an injustice to the pilots and, moreover, it can not be within the power of a Crown officer to commit an injustice in the name of the Crown. It is the mandate and duty of a Pilotage Authority to fix the dues at rates that are just and reasonable for both vessels and pilots; otherwise, the dues become illegal *ipso facto* because they are the result of an abuse of power.

The withdrawal of relative exemptions is left to the discretion of each Pilotage Authority. The Act is silent as to the criterion that should govern the exercise of such discretion except to say they may be withdrawn "wholly or partially and, if partially, to what extent and under what circumstances". If rules are not set out in the text of the Act they must be derived from the

context because it is improbable that Parliament's intention was to allow this delegated power to be exercised in a purely arbitrary manner without taking into account the underlying purpose of the legislation, the requirements of the service and the principles of justice and equity. Therefore, any withdrawal of a relative exemption that can not be justified as such is illegal, because it results from an abuse of power. Safety of navigation may be one of these unwritten governing principles because, as seen above, the scheme of exemptions tends to increase safety of navigation. However, the main principle under the present legislation is to achieve the aim of the compulsory payment system, i.e., to provide the pilots with sufficient pilotage to permit them to maintain and improve their skill and knowledge and, at the same time, to ensure they receive an adequate income. But the compulsory payment system should not be used either to provide employment for more pilots in excess of the number required by the normal demand or merely to raise funds.

It would be illegal to base the withdrawal of an exemption on the nationality or residence of an owner and, for the same reason, it is considered that withdrawal based on flag or registry alone would amount to discrimination. Nevertheless withdrawal would be justified if it is based on class of ship, such as large liners and tankers, or bridge-aft ships, or the circumstances of a trip, such as those entailing some special difficulties, i.e., exemptions that would apply to certain areas of a District. For instance, in the New Westminster District, an exemption might be withdrawn only if the exempt ship has to transit the railway bridge.

If safety of navigation is recognized as the basis for imposing compulsory pilotage, the only criterion will be safety and an exemption will be granted only if and when a Pilotage Authority is fully satisfied that a vessel is not a safety risk when navigating in its District, or in a specific area of the District.

2. Action taken by Pilotage Authorities on exemptions

Pilotage Authorities always have used their By-laws to deal with exemptions (vide C. 8, pp. 246-248).

(a) *Small foreign ships.* Most Pilotage Authorities have not taken the trouble to make a regulation covering exemptions for small ships registered outside Her Majesty's dominions. This question is dealt with in only six Districts: Sydney, New Westminster and Port aux Basques, where an exemption is granted at large to all vessels under 250 net tons; and Halifax, Saint John and Churchill, where the exemption is restricted to pleasure yachts. The legal result is that any foreign ship, no matter how small, is subject to the compulsory payment of dues in all other Pilotage Districts, e.g., an American pleasure craft that is not a row-boat must pay pilotage dues when passing through the Cornwall District, or going up the Fraser River, or entering B.C. District waters. This requirement is so unreasonable that it is never applied. The resultant totally illegal situation could easily be overcome

by following the simple procedure outlined in subsec. 346(c). The Pilotage Authority concerned is bound to collect pilotage dues from every small foreign ship because, as far as it is concerned, each case is a public claim, and the Pilotage Authority has no power to take it upon itself to decide whether or not to collect public money. If this provision is to be retained in future legislation, it is considered that the question would be more adequately dealt with if subsec. 346(c) was amended to grant a direct but relative exemption to all small foreign ships of 250 tons net or less. This exemption could be subject to withdrawal by the Pilotage Authority in the same manner as provided for in sec. 347. Using this procedure, small ships would be automatically exempt except those categories a Pilotage Authority might consider undesirable to exempt on account of special circumstances which make them safety risks.

(b) *Withdrawal of relative exemptions.* Most Pilotage Authorities have taken advantage of the powers granted by sec. 347 to vary exemptions for steamships locally employed. Three examples are:

Subsec. 6(2) of the Cornwall District By-law restricts exemptions to Canadian registered steamships (their American counterparts enjoy an absolute exemption under subsec. 346(ee) C.S.A.); subsec. 6(3) of the Halifax District By-law withdraws exemptions except for Canadian registered ships which are totally exempt if under 1,000 tons and 50% exempt if over that tonnage; in the Humber Arm District, subsec. 5(2) withdraws the exemptions of subsec. 346(e) completely and, instead, provides another scheme exclusively for locally owned and locally employed vessels. The Humber Arm scheme is illegal in so far as it exceeds the terms of subsec. 346(e). Hence, despite the By-law provision, it is imperative for vessels that are not steamships and for those that do not come within one of the voyage classifications of subsec. 346(e) to pay dues.

(c) *Miramichi By-law.* The Miramichi By-law, subsec. 6(1), reproduces all the permanent provisions of sec. 346 C.S.A. except the exemption for small ships registered in Her Majesty's dominions, which was illegally restricted to ships of Canadian register. The practice of including in a By-law the provisions of the Act is objectionable because a By-law should contain only additional legislation made by *intra vires* regulations. This is not the case here and can only result in confusion, e.g., if the Act is amended and the By-law is not; or if, as has happened in this instance, a Pilotage Authority varies a permanent provision of the Act over which it has no legislative authority.

(d) *Complaints of discrimination.* In a brief (Ex. 1132) to this Commission, the Imperial Oil Company charged that the lack of uniformity in the scheme of exemptions as varied by the By-laws of various Districts amounts to discrimination. For instance, they complained that their Canadian registered coasting ships which are not subject to compulsory payment

on the West Coast, even if they sail between an American port and a Canadian port, do not receive the same treatment when they call at Halifax or Sydney. This complaint is unfounded and there can not be any question of discrimination. It must be remembered that each District is an autonomous entity and this lack of uniformity is exactly what was contemplated by Parliament when it granted to the various Pilotage Authorities power to vary relative exemptions. If uniformity had been intended, sec. 347 should not have been added. As seen earlier, the application of sec. 347 depends on essentially local considerations.

3. Loss of Exemptions

The establishment of the compulsory payment system does not affect an exempt ship except in an indirect way and in very special circumstances: an exempt ship loses her exemption if on her inward voyage she does not comply with the requirements that the Act has specifically imposed. An exempt ship will be called upon to pay pilotage dues, even if a licensed pilot was not employed, only in the two situations defined in sec. 348, i.e., when on an inward voyage:

- (a) the ship showed she required a pilot by displaying the proper signal but failed to accept the services of any one of the pilots who offered their services (subsec. 348(a)) (*Corporation of Pilots v Brigantine Horsey* 1884, 10 C.S. 257);
- (b) a non-licensed person was employed to pilot or guide the ship (subsec. 348(b)) (this in addition to the penalty provided in sec. 356 for hiring an unlicensed pilot).

But if an exempt ship undertakes any other type of voyage or trip, the compulsory payment system does not apply. For instance, employment of an unlicensed person for an outward voyage renders a Master liable to the fine prescribed in sec. 356 if the unlicensed person acts as pilot, but the ship's exemption is not lost. However, there will be no penalty if the unlicensed person is used merely to "guide" the ship because this is not forbidden under sec. 356.

Subsec. 348(a) no longer applies because there is no prescribed signal for a pilot (sec. 363) and, even if there were, the pilots no longer offer their services but are despatched if, and when, their services are required. It is considered that if the compulsory payment system is to be retained the application of subsec. 348(b) should be extended to all types of voyages and trips and to movages.

B. NON-AVAILABILITY OF PILOTS—SECOND EXCEPTION

The second exception to the obligation to pay dues is when no pilot is available on an inward voyage (sec. 345):

“... unless

- (a) such ship is on her inward voyage and no licensed pilot offers his services as a pilot after a reasonable notice of expected time of arrival has been given”.

This section raises the following questions: why inward voyage only, why such advance notice of expected time of arrival (ETA) instead of the former practice of displaying a signal for a pilot, and what constitutes reasonable notice?

In 1873, it was only on an inward voyage that the Master had no opportunity to verify whether pilots were available or not. There was no means of ship-to-shore communication whereby advance notice of arrival could be given and, therefore, in order not to delay ships, the pilots were required to cruise constantly in their pilot boats throughout the boarding area so as to be available as soon as vessels arrived². Hence the regulation that if on arrival at the seaward limit a ship displayed the signal for a pilot and no pilot offered his services, the ship was allowed to continue on her own if the Master wished to dispense with a pilot. Under these circumstances the ship was not subject to compulsory payment.

The development of wireless communications enabled ships to send an ETA but since they were not required to do so they often arrived unexpectedly and the pilots were never sure when to look for them. This situation was corrected by the 1950 amendment whereby all non-exempt ships were required to give a reasonable ETA (14 Geo. VI c. 26).

No doubt the main purpose of an ETA was to permit the efficient operation of a despatching system which would relieve the pilots from the necessity of remaining in their boarding area. Aside from the fact that such a system is not permissible under Part VI, the factual situation is that Pilotage Authorities in the majority of the large Districts operate a despatching system as provided for in their By-laws. The requirement to provide an ETA is an improvement, but the situation still leaves much to be desired.

An ETA is required only from non-exempt ships, not as a condition for obtaining the services of a pilot, but merely to apply the automatic exemption that may result from the non-availability of a pilot and for allowing

² It was held that the Trinity House Act imposed compulsory pilotage under the regulation that the pilot was required to be in his pilot boat a reasonable distance from an incoming vessel, with a distinctive pilot flag flying at the mast head as a signal to indicate that he was on the watch for vessels to take them in charge and pilot them to Quebec. On one occasion a pilot had boarded a vessel as a passenger at Rimouski and when the vessel reached the district limits (at that time the boarding area was situated at Bic) he demanded to be given charge of the vessel. This he was denied. The claim for pilotage dues was dismissed because he had not offered his services in the prescribed way as aforesaid (*Ex parte Chrysler; Simard v Corporation of Pilots* (1864) 14 L.C.R. 209).

a ship to proceed without one. The despatching authority has no right to impose a pilot on a ship (much less to discriminate between ships which require pilots) any more than the pilots at a seaward boarding station have these rights. Ships are to be provided with pilots in the order of their arrival, whether or not an ETA was sent. Since the despatching authority plans its assignments on the number and priority of ETA's received, ships which arrive unexpectedly sometimes take the pilots intended for others thus creating a shortage of pilots. At times, pilots volunteer to proceed immediately on a new assignment after just completing one although they risk the safety of the ship concerned because they are tired and not physically fit. If despatching is recognized in future legislation, such situations should be covered by extending ETA requirements to all ships which require a pilot and, in addition to any penal sanction that may be provided, by giving precedence to ships that comply with the regulation.

The requirement for a reasonable ETA is vague and leaves room for much contention. Under the present legislation Masters are entitled to expect that pilots are constantly available at all boarding stations and, therefore, they need do no more than send an ETA sufficiently in advance to allow a pilot time to proceed from the boarding area to meet the ship. Under these circumstances a few hours' notice is all that is necessary in any District. However, the actual situation is different in that a despatching authority normally maintains in a boarding area only the number of pilots required to meet the expected demand. This provision lays down no criterion how to determine a reasonable time in relation to organizational arrangements which vary from one District to another. The amount of advance notice needed in each District varies from one or two hours, or even less in some ports, to a minimum of ten hours at Les Escoumains and at least one and a half days at Prince Rupert, under present arrangements. The Master of an incoming ship can not be expected to know the governing factors and, therefore, he has no way of deciding what is reasonable. There is no provision in the Act whereby the Authority can prescribe what the minimum notice should be in each locality.

It is relevant to note that the Pilotage Authorities have not tried to deal with ETA's in their By-laws and have not even laid down how long in advance they should be sent. But the By-law in each District, except Churchill, contains a section titled "Notice of Requirement of Pilot" which, except for a few minor changes to suit local needs is, in substance, the same as sec. 13 of the British Columbia District General By-law:

"13. The master or agent of a vessel requiring a pilot shall notify the Superintendent in sufficient time to enable the pilot to meet the vessel, stating the time the pilot as required on board, the place where the vessel is to be boarded and the duty that is required to be performed."

The variations are as follows: In Prince Edward Island notice is to be given to "the pilot of the port concerned"; in the Restigouche River District "to the master pilot at least six hours in advance"; in the other Commission Districts to the Secretary; in the Montreal District the notice is also to contain draught and tonnage (no doubt because the pilots are classified into grades).

Under the present legislation this By-law provision is illegal because it does not come within any of the subject-matters on which a Pilotage Authority may legislate by regulation. Moreover, there is no way of enforcing application. This is probably why, except for Restigouche River, the Pilotage Authorities have not fixed a minimum time limit for notices of requirement. Two facts emerge: first, the ETA requirement for non-exempt ships only no longer meets the needs of the service; second, what is required now is adequate advance notice that a pilot is required. This is one consequence of replacing the free enterprise system with an orderly division of pilotage assignments by means of a despatching system because efficient planning to conserve the pilots' time necessitates advance notice from every ship which requires a pilot or is required by legislation to employ a pilot.

C. PILOTAGE CERTIFICATE—THIRD EXCEPTION

The third exception to compulsory payment is a ship navigated by one of her own officers who holds a valid pilotage certificate.

This exception is not actually applied, not because it has no practical value but merely because the Pilotage Authorities do not employ it. If an appropriate regulation was passed, the Pilotage Authorities would have power to grant certificates to Masters and mates to act as pilots of the ships in which they are employed, in accordance with the terms, conditions and fees established in the District By-law, in much the same way as the so-called "B" certificates for pilotage in the undesignated waters of the Great Lakes Basin (sec. 375B) (vide Part V, *Great Lakes Pilotage*).

The first legislation on this subject was introduced in the 1873 Pilotage Act and remained almost unaltered until the 1950 amendment (14 Geo. VI c. 26).

Prior to 1950, statutory provisions established the procedure for licensing Masters and mates, prescribed the certificate and limited its duration to one year, but made it renewable on payment of a fee. The fee for a certificate and its renewal was fixed by the Pilotage Authority with the approval of the Governor in Council. The certificates were subject to withdrawal for incompetence or misconduct. By an amendment introduced in 1879 (42 Vic. c. 25) such certificates could be issued only to Masters and mates of ships registered in Canada. Certificate fees were to be applied first to pay examination expenses and thereafter, at the discretion of the Pilotage

Authority, either to pay the general expenses of the District, or to add to the pilot fund, or to be disposed of for the benefit of the licensed pilots. The Act provided that such certificates could not be issued by the Pilotage Authorities of the Districts of Quebec, Montreal, Halifax and Saint John. If a ship piloted by such a certificate-holder entered the limits of a District, a white flag bearing the certificate number of the holder had to be hoisted at the main (hence the expression "white flag certificate") (secs. 330, 331 and 340, 1934 C.S.A.). The origin of these now repealed provisions has been traced to the U.K. Merchant Shipping Act, 1854 (subsec. 333(4) and secs. 340 to 344).

The 1950 amendment repealed all these statutory provisions and left the whole question to be decided by the Pilotage Authority by by-law legislation. This licensing power was extended to all Pilotage Authorities and the privilege of obtaining such certificates was extended to the Masters and mates of ships of any nationality.

This is a legal means placed at the Pilotage Authority's disposal to deal with statutory exemptions, e.g., it was the indicated solution to the problem of United States ferries in the B.C. and New Westminster Districts. Furthermore, such a solution has the advantages of being both legal and consistent with the safety of navigation, even more so than an extension of the statutory exemptions which Bill S-3 would have provided if it had become law.

At present, however, no District has a By-law on the subject, with the result that no Pilotage Authority may now grant certificates. If, at any time, a Pilotage Authority considers it advisable to have this power, it has only to make the necessary regulation.

COMMENTS

Local knowledge and experience in local navigation are the ultimate and most essential requirements for safe navigation in confined waters. Since the *raison d'être* of organized pilotage is to provide shipping with the services of qualified navigators who are experts in navigating local confined waters, an efficient and adequate pilotage service is the ultimate means of enhancing safety of navigation.

As a rule, compulsory pilotage should be imposed: (a) on Masters who do not possess the necessary degree of local knowledge to navigate their ship or navigation unit safely; (b) in ship channels where a maritime disaster would seriously affect the economy of the country and the interest of the public.

Because pilotage is the most effective way of achieving safety of navigation, it should come under the jurisdiction of the authorities responsible for the safety of navigation, wherever such safety is of vital importance to

the country. Conversely, the involvement of these authorities is not as necessary where the safety of navigation is not an essential national concern. For instance, nowhere is the safety of ship channels more vital to Canadian interests than on the St. Lawrence River. It is pertinent to note that in the St. Lawrence Pilotage Districts of Quebec and Montreal the Authority responsible for the safety of navigation has always been the Pilotage Authority. Originally the Trinity Houses of Quebec and Montreal, and the Harbour Commissioners after them, were, in fact, the Department of Marine outside the Government. They were fully responsible for the safety of navigation on the river and were given the means to achieve it, including their function as Pilotage Authority. In addition to controlling all maritime traffic, they also held inquiries into shipping casualties, whether or not pilots were involved. The situation was not altered when, in 1903 and 1905, the Minister superseded the Harbour Commissioners as Pilotage Authority in these two Districts. By contemporaneous amendments to the Quebec and Montreal Harbour Commissioners Acts their other powers over the safety of navigation on the St. Lawrence River had already been transferred to the Minister, a situation that has remained unchanged to date.

The degree of local experience the navigator of a ship or navigation unit should possess, and in what circumstances this experience is to be presumed or ascertained, are questions to be determined locally by including appropriate criteria in the regulations. Direct exemptions can be granted to vessels whose navigation is not considered to imply any safety risk in local circumstances, and indirect exemptions to a class of vessels by issuing pilotage certificates to those Masters and mates the Pilotage Authority is satisfied possess the degree of local knowledge and experience which has been established in the regulations as necessary for safe navigation. For instance, pilotage certificates may be made a general requirement before a vessel may enjoy an exemption whenever her navigator possesses a certificate of competency over which the Canadian Government has no control.

If future pilotage legislation places emphasis on safety of navigation, Pilotage Authorities should be given the means to achieve this aim under proper legislative and administrative control. The scope of the Act should be enlarged to apply to all vessels including rafts, booms, barges and any other water-borne objects under navigation. The Act should contain provisions whereby, when required in the public interest, a Pilotage Authority could be vested with power to modify the rule of the road to enhance safety, and the governing factor for imposing any degree of compulsory pilotage and for providing exemptions should be safety of navigation. Effective means to enforce the regulations should be provided and, if a vessel is prohibited from navigating except when conducted by a licensed pilot, she should be, in addition to other sanctions, liable to arrest if she attempts to proceed without a pilot and should remain under arrest until a licensed pilot is placed in charge.

The compulsory payment system has its merits and might still be applied as a lesser degree of compulsory pilotage. The same results could be achieved by making it compulsory to take on board a person duly licensed to act as a pilot and pay him as such, but without the Master being obliged to place the navigation of the vessel in his charge. Failure to comply would render the vessel liable to pay a penalty in the amount of the pilotage dues that would have been payable if a pilot had been taken on board.

The principles and procedures laid down in secs. 345, 348, 349, 350, 351 and 357 C.S.A. no longer correspond to present realities and, on account of the amendments to which they have been subjected, they lack co-ordination. If the existing system is to be retained, a realistic and effective procedure should be laid down. There is no longer any need to make special provision for inward voyages. In all cases an advance notice of requirement for a pilot should be an essential prerequisite. Failure to comply should make a vessel lose precedence in the despatching office and, in compulsory pilotage Districts, it should carry a penal sanction against a non-exempt vessel. In addition, a delinquent vessel should be liable to pay any additional expenses caused by failure to send an advance notice of requirement, unless the Master agrees to wait at the boarding station until a pilot can be made available in the usual way. The time of arrival at the boarding area would then be considered the equivalent of the required notice. Each Pilotage Authority, subject to the control of higher authority, should have power to determine, by regulation, the minimum time limit for such notices for each boarding area, to fix boarding areas, and to direct procedures and equipment to facilitate the embarking of pilots. Since Masters no longer have a choice of pilots the Act should make it possible to institute mandatory despatching. Exempt vessels should lose the benefit of their exemption automatically when a notice of requirement is sent or when an unlicensed person is used, either to pilot or guide a vessel, on voyages or trips of any type and in movages.

Such a scheme would make it possible to enforce compulsory pilotage even on inward voyages in coastal Districts, e.g., British Columbia, where enforcement of the compulsory payment of dues is now impossible because all six hundred miles of the B.C. coastline are pilotage waters which can be entered from anywhere along the coast. There is nothing in the Act which permits a Pilotage Authority to order a vessel to detour from her chosen route to a boarding area, or even to disclose the entry route she is following. Obviously the requirement of subsec. 345(a) was drafted with the port type Pilotage District, to which there is only one entrance, in mind. A mere ETA which does not indicate the place of entry exempts a ship from compulsory payment if no pilot happens to offer his services. In fact, in British Columbia, vessels could proceed to any port except Victoria, Esquimalt, Port Alberni and Prince Rupert without passing through a boarding area where the Pilotage Authority would normally arrange for a pilot to embark. The fact that the

problem never arises does not mean it is non-existent but merely that the great majority of non-exempt vessels which require a pilot would not dispense with pilotage service even if the compulsory system did not exist. If the exemption for inward voyages in subsec. 345(a) was abolished, the general rule would apply and all non-exempt ships would be liable to pay dues. Then if a ship wished the benefit of services of a pilot, she would have to conform to legally established requirements governing embarkation and disembarkation.

Chapter 8

NATURE AND POWERS OF THE PILOTAGE AUTHORITY

DEFINITION AND NATURE OF THE PILOTAGE AUTHORITY

In its Interpretation Section (subsec. 2(69)) the Canada Shipping Act contains a restricted definition of the term "Pilotage Authority" which has ceased to serve the purpose for which it was originally intended and, because of its wording, may now be a source of confusion. It reads as follows:

"2(69) "Pilotage Authority" means any existing pilotage authority and any persons authorized by the Governor in Council to appoint or license pilots or fix or alter rates of pilotage; if the pilotage authority is the Minister of Transport, it includes the Deputy Minister of Transport".

This definition contains three distinct provisions:

- (a) a transitional proviso;
- (b) a definition proper;
- (c) a stipulation as to the composition of the Pilotage Authority when the appointee is the Minister of Transport.

In the transitional provision the Act acknowledged the existence, and recognized the status, of the various Pilotage Authorities that existed when the 1934 Act came into force. A proviso of this nature was necessary to assure continuity, but to include it in the Interpretation Section seems questionable. The logical place for it is among the transitional provisions contained in any new legislation, in this case, sec. 718 of the 1934 Canada Shipping Act. The result of the transitional provision in the definition and sec. 718 combined was, *inter alia*, that until the Governor in Council finally appointed the Minister of Transport, Pilotage Authority for the Districts of Quebec and Montreal, he remained the Pilotage Authority appointed by special statutory provisions in 1903 and 1905 (3 Ed. VII c. 48; 4-5 Ed. VII c. 34), which were included in the 1906 and 1927 Canada Shipping Acts, but repealed in the 1934 Act. However, since that time the Minister of Transport has become Pilotage Authority by virtue of a Governor in Council appointment pursuant to sec. 327 of the Act. The last Order in Council which so appointed him Pilotage Authority for these two Districts (among

others) is dated August 15, 1956 (P.C. 1956-1264, Ex. 1143). The need for the transitional provision in the definition has now disappeared completely because all existing Pilotage Authorities have been appointed similarly, i.e., by the Governor in Council.

It is considered that *the third part of the definition*, regarding the composition of the Pilotage Authority when the Minister is the appointee, is not properly located because the same topic is covered in the first part of subsec. 327(2). For the sake of brevity and clarity, these two provisions should have been integrated.

What is purported to be the definition of the term 'Pilotage Authority' is contained in the *second part of the statutory definition*, i.e., "any persons authorized by the Governor in Council to appoint or license pilots or fix or alter rates of pilotage".

Although some definition may be necessary, it is believed that this wording creates confusion and moreover is inconsistent with the Act.

As the definition is worded, the two powers ascribed to the Pilotage Authority are not complementary but alternative. This indicates that the Governor in Council has power to appoint Pilotage Authorities which enjoy only one of the two enumerated powers, with the result that in the same District there could be one Pilotage Authority with licensing powers and a second to fix rates. This differentiation is inconsistent with the provisions of Part VI which deal with a single Pilotage Authority enjoying both powers. As worded, subsec. 327(1) makes it possible for two Pilotage Authorities to be appointed in one District, the Minister being the second appointee, but such an action amounts to dividing the District into two distinct and autonomous sectors with each Pilotage Authority enjoying the same full powers over its own sector. However, as seen earlier, such appointments were never made (vide C. 3, p. 47).

The reason this definition exists is purely historical: it is a slightly modified version of the 1873 statutory definition which was drawn verbatim from sec. 2 of the 1854 Merchant Shipping Act of the U.K. The 1873 definition read as follows:

"The term 'Pilotage Authority' means any person authorized to appoint or license pilots, or to fix or alter rates of pilotage, or to exercise any jurisdiction in respect of pilotage".

In the U.K., a general definition of this nature was necessary in order to include all the various Pilotage Authorities that existed by virtue of special charters, particular Acts of Parliament and the Merchant Shipping Act. This, to a lesser degree, was also the situation in Canada at the time of Confederation. The Saint John Pilotage Authority existed by virtue of the Saint John City Charter, and there were other Pilotage Authorities that had been created or appointed by virtue of Acts of the various provinces. Their powers varied considerably, e.g., at one time the rates of pilotage dues for the ports

(Districts) of Montreal and Quebec were fixed by Parliament in the Trinity House Acts. This situation no longer exists because all Pilotage Authorities in Canada are now appointed under the same Act. Hence there is no need to retain the statutory definition as now worded.

However, the present definition makes it legally impossible to create a Pilotage District in the Great Lakes Basin, as defined in subsec. 375A(b) of Part VIA of the Act, i.e., the Canadian waters of the Great Lakes and the St. Lawrence River as far east as St. Regis, because the existence of a Pilotage Authority with both or either of the two powers enumerated in the statutory definition would be inconsistent with the provisions of Part VIA, if only because, in that area, the Governor in Council has no power to appoint, but only to make regulations. This matter will be further studied in that part of the Report dealing with the Great Lakes Basin.

It is desirable to define the term in the Act to avoid confusion or any possible ambiguity by identifying it with the licensing function thereby indicating that any other person or authority exercising any other pilotage function or power can not on that account be "Pilotage Authority".

From the context of the Act the term "Pilotage Authority" is synonymous with "District Pilotage Authority" (secs. 325 and 329) and always refers to the authority in charge of a Pilotage District.

LEGAL STATUS OF THE PILOTAGE AUTHORITY

It is pertinent to observe that under the existing provisions of Part VI, a Pilotage Authority is *not a corporate body*. This status would not be incompatible with the functions of an Authority, but under the scheme of organization presently in force, it is unnecessary.

Originally, the Act granted such a status to the Pilotage Authorities of the Halifax and Saint John Districts (secs. 423 and 427, 1906 C.S.A.). Montreal and Quebec Pilotage Authorities were also corporations as a result of special legislation. No doubt, this status was warranted because the persons who formed these four Pilotage Authorities were not all Government appointees: some were elected by local interests as provided in the pertinent Acts. The fact that these four were singled out can only mean that all other Pilotage Authorities which were composed of Government appointees only, were not corporate bodies, and that it was not intended they should be.

The distinction has some importance on account of the powers such a status implies. These powers are detailed in subsec. 20(1) of the Interpretation Act as follows:

"20. (1) Words establishing a corporation shall be construed

- (a) to vest in the corporation power to sue and be sued, to contract and be contracted with by its corporate name, to have a common seal and to alter or change it at pleasure, to have perpetual succession, to acquire and hold

personal property or movables for the purposes for which the corporation is established and to alienate the same at pleasure;

- (b) 'in the case of a corporation having a name consisting of an English and a French form or a combined English and French form, to vest in the corporation power to use either the English or the French form of its name or both forms and to show on its seal both the English and French forms of its name or have two seals, one showing the English and the other showing the French form of its name;
- (c) to vest in a majority of the members of the corporation the power to bind the others by their acts; and
- (d) to exempt from personal liability for its debts, obligations or acts such individual members of the corporation as do not contravene the provisions of the enactment establishing the corporation."

As will be seen later (C. 8, pp. 314 and ff.), a Pilotage Authority composed exclusively of Government appointees does not need all these powers. The Act ensures that the Authority is provided with the necessary powers to enable it to discharge the limited responsibilities imposed upon it by the Act. However, if future legislation substantially modifies the rôle of the Pilotage Authority and enlarges its responsibilities, it may prove desirable to grant it corporate status.

The status of the Pilotage Authority has been the object of some court decisions including:

- (a) In the case of *Himmelman et al. v the King* (1946 Ex. C.R. 1), it was held that the nature of a Pilotage Authority is not modified by the fact that it is a one-man Pilotage Authority rather than a board. After considering the powers and rights of the Minister as Pilotage Authority, the control exercised by the Crown over revenues and expenses, the required approval of By-laws, the appointment of the Pilotage Authority by the Crown and the office held during pleasure, the court came to the conclusion that the Minister was an agent of the Crown when acting as such:

"It is clear from this that the Minister as pilotage authority is not *persona designata* or 'a corporation sole'. I hold that the Minister of Transport as pilotage authority is the agent of the Crown."

- (b) In 1940, the same court, in *Gariépy v The King* (1940, 2 D.L.R. 12) (Anger, J.), after having studied the various provisions regarding the appointment of the Pilotage Authority, stated:

"It follows from these provisions, it seems to me, that the Minister of Marine when acting as pilotage authority in the Montreal or Quebec District does not exercise the powers conferred on him by the Department of Marine Act but those attributed to him by ss. 395 and 397 of the Canada Shipping Act and that being the case he appears to me to be an officer of the Crown in the same position as the pilotage authority created by ss. 399 and 400 or constituted under s. 411. As such, he is, in my opinion, on the same footing as any other officer of the Crown and he cannot bind the Crown by his errors, etc."

- (c) In the Supreme Court of Canada decision in the case of *McGillivray v. Kimber et al.* (1915, 52 S.C.R. 146) Mr. Justice Anglin stated, *inter alia*:

“The relationship of master and servant does exist between the Board (Pilotage Authority) and the pilot. The Board has a statutory control over the licensing of pilots within the territory for which it is constituted. Its jurisdiction to cancel a pilot’s licence is also statutory . . .”.

These decisions, as well as the context of the Act, indicate that a Pilotage Authority, whatever its composition, is an officer of the Crown appointed as an agent for a special and definite purpose and its powers, duties and responsibilities are found in Part VI of the Canada Shipping Act. It is a licensing authority possessing other related and accessory powers.

POWERS OF THE PILOTAGE AUTHORITY

Part VI of the Act confers on a Pilotage Authority the following powers that can be exercised within the Pilotage District for which it is appointed:

- (a) regulation-making powers,
- (b) licensing powers,
- (c) some miscellaneous powers related to (b).

A. REGULATION-MAKING POWER

Definition

As seen earlier, Parliament has established in Part VI the mechanism for appointing its licensing agents and for defining their territorial jurisdiction. It has also legislated on matters affecting third parties and shipping interests, and has incorporated in the Act almost all the provisions that have a character of permanency and are of general application. But it has not attempted to deal with the individual requirements of each locality where pilotage service is provided, i.e., to pass legislation that is special in character. Instead, for this purpose it has delegated to each Pilotage Authority its own legislative power with the responsibility of completing legislation to meet local requirements. This is the regulation-making power of a Pilotage Authority.

Mr. E. A. Driedger, Deputy Minister of Justice, in his volume “Legislative Forms and Precedents” (1963) sums up the situation on page 38:

“Not all laws are made by Parliament. In most modern statutes, Parliament delegates to some other body or person the authority to make laws. Various words may be used to describe the instruments that may be issued in the exercise of a delegated legislative authority. Thus, they may be described as orders, rules, regulations, by-laws. Not infrequently two or more of these words, or similar expressions, are used. Thus, a Minister may be authorized to make orders and regulations. These terms do not have precise meanings and in many instances are interchangeable. But they are not always synonymous. Some instruments are best described as orders, others as regulations, others as by-laws, etc.”.

Whenever a requirement or a matter of legislation is of a permanent and general character it should be incorporated in the Act. Whenever a regulation should exist, but in different degrees, a prototype should be incorporated in the Act with power delegated to each Pilotage Authority to modify the regulation to suit the special requirements of its District. Entire discretionary power over legislation should not be left to the Pilotage Authorities because experience has proved that more often than not this power has been neglected or improperly used. For instance, since a pilot is by definition a mariner who is expected to have sufficient qualifications to take charge of the navigation of any vessels likely to call in his District, a basic marine qualification should be a statutory requirement and the Pilotage Authority should be granted the power to increase, but never decrease, this requirement by its regulations. If this had been done, the situation that prevails in the Prince Edward Island District, where most pilots do not hold any marine certificates of competency, would not have arisen. If the question of the exemption of small ships (subsec. 346(c)) had been treated in the same way as those in subsec. 346(e), where exemption is granted subject to repeal or modification by Pilotage Authorities, the unsatisfactory situation that now prevails concerning the exemption of small foreign ships would have been avoided. With reference to the conduct of pilots, most of the offences enumerated in subsec. 329(f) should be contained in all regulations.

This power to legislate could have been delegated to someone else, to the Governor in Council for instance, as is done for the Great Lakes Basin under Part VIA, but there is no objection—on the contrary there are only advantages—if it is exercised by the agent of the Crown who is responsible for appraising the competence and reliability of the pilots in a given District. By definition, the Pilotage Authority is expected to be more conversant than anyone else with local needs and requirements. The Pilotage Authority envisaged in Part VI is all the more indicated because it is a disinterested party. In point of fact, this situation no longer prevails since in most Districts the Authority takes over complete administration of the service. Even so it is considered that the Pilotage Authority is indicated as the regulation-making authority, with the reservation that some method of active control by a superior authority is warranted as a check against misuse or abuse of this power.

Legislative and executive powers

There is a basic difference between a legislative regulation and an administrative or executive decision. When the two powers are exercised by one and the same person, the limits between the two become ill-defined and administrative decisions of a general nature that could be termed “standing orders” are often confused with regulation legislation. This is what has happened in the case of By-laws made by Pilotage Authorities. The main reason may be the fact that a clear distinction is not always made in the Act itself.

A regulation (referred to as by-law in Part VI) is, in fact, legislation passed by a Pilotage Authority acting in lieu of, and for, Parliament. The rôle of Parliament is not to administer any service but to pass legislation, i.e., to define and stipulate rules for the direction of persons in a certain domain, and to grant them various powers under which a system, including rights, privileges, offices and responsibilities, is created. On the other hand, an executive decision is the exercise by officers of the Crown of the powers granted by legislation. When such a decision affects the direction of another person it is an order, and becomes a standing order if it has a character of permanency and affects more than one individual. To become effective, a regulation must meet the procedural requirements set out in the Act under which it is passed, and also in the Regulations Act (1952 R. S., c. 235). On the other hand an administrative decision is valid without formality, unless there is some specific requirement in the Act governing the exercise of this power. Frequently, the similarity of the requirements in both cases is an additional factor which promotes confusion.

When a Pilotage Authority makes a regulation or takes an executive decision, it is acting in two distinct capacities which can become easily visualized by considering that the two powers are exercised by two separate persons. Then, it becomes obvious that a regulation-making authority has no power to deal with expenses and liabilities incurred by a Pilotage Authority in the discharge of its responsibilities because the legislative side of the matter has been fully dealt with by Parliament in sec. 328, C.S.A., which authorizes the Pilotage Authority to spend out of licence fees and pilotage dues the amount necessary to meet its expenses, subject to the sanction of the Governor in Council. It is not until the distinction between these two separate capacities of the Pilotage Authority is clearly understood that subsec. 329(p) becomes clear, as will be explained later.

A further cause of confusion is the use of the same terms—"by-laws, orders, regulations, rules"—for decisions of either a legislative or administrative character. However, it is important to differentiate between them not only to avoid the confusion which otherwise results but also because the requirements for their validity differ.

The distinction between regulations or by-laws made in the exercise of a legislative power and those that result from the exercise of an administrative power is made in sec. 2 of the Regulations Act. The term "regulation-making authority" is defined as meaning "every authority authorized to make regulations" (subsec. 2(b)) and the term "regulation" is defined in subsec. 2(a) as follows:

"2. In this Act,

(a) 'regulation' means a rule, order, regulation, by-law or proclamation

- (i) made, *in the exercise of a legislative power* conferred by or under an Act of Parliament, by . . . a board, commission, corporation or other body or person that is an agent or servant of Her Majesty in right of Canada, or
- (ii) for the contravention of which a penalty of fine or imprisonment is prescribed by or under an Act of Parliament, . . .”.

Only the rules, orders, regulations and by-laws which satisfy the above definition are legislative and only these are subjected to the requirements of the Regulations Act as to transmission to the Clerk of the Privy Council for recording, publication in the *Canada Gazette*, and report to Parliament.

It is believed that legislation would be clearer and better understood if a distinction was made between regulations and orders resulting from legislative power and those resulting from executive power.

The easiest way to achieve this is to follow the basic rules for drafting legislation: first, by always using the same term to express the same concept; secondly, by stating in a statutory definition the intended meaning of each key term, especially of such terms as “by-laws”, “regulation” and “order” which have more than one meaning. It is considered that:

- (a) “regulation” should be used in its specific meaning, to designate legislation made under a delegated power. “A regulation is generally, in form and substance, of the same character as a statute”. (Driedger *op. cit.* p. 39):
- (b) “order” should be used to indicate a decision resulting from the exercise of executive power. “The term is used to describe a particular direction, usually to a particular person to do or abstain from doing a particular thing.” (Driedger *op. cit.* p. 38);
- (c) “The term “by-law” is applied to rules made by an association or corporation for the regulation of its proceedings. The by-laws may go beyond the proceedings of the association or corporation itself and govern the conduct of other persons”. (Driedger, *op. cit.* p. 39). When used in the latter meaning (as in Part VI, C.S.A.) it becomes synonymous with “regulations”. Therefore, it is considered that the term “by-law” should not be used in that sense in pilotage legislation but only in its specific and restricted first meaning.

Regulation-making power, limited and controlled

The power of a Pilotage Authority to legislate for its District by regulation is neither absolute nor unlimited because regulations must be confirmed by the Governor in Council and must also be *intra vires*.

Confirmation by the Governor in Council of a Pilotage Authority's regulations is not *per se* an essential requirement to the exercise of a regulation-making power, but is a requirement in this case because it is part of the scheme Parliament devised to permit a Pilotage Authority to enact legislation. The rule is stated in a provision of general application, subsec. 331(1), C.S.A.:

"331(1) . . . every by-law made by any pilotage authority in the exercise of the powers conferred upon it by this Part shall be valid and effectual when confirmed by the Governor in Council".

Hence, it is a drafting error to repeat this requirement in sections which define the subject-matters of regulations (subsec. 327(2), sec. 329, subsec. 346(c) and sec. 347). It may be a source of confusion if the requirement is omitted elsewhere (e.g. subsecs. 349(1)(b) and 357(2)).

This requirement for confirmation is a means of control that Parliament has devised against possible abuses of this power by a Pilotage Authority and also to prevent the enactment of legislation that is in conflict with public interest, other legislation or Government policy. But the Governor in Council's power is purely negative. He can only refuse to confirm a by-law with which he is not in agreement; he can neither modify a proposed by-law nor withdraw confirmation once it has been granted; even less can he act *proprio motu*, no matter how defective a given set of District regulations may be.

In the U.K., the Pilotage Act of 1913 gives greater power to the approving authority, which can confirm by-laws made by a Pilotage Authority, with or without modifications (subsec. 17(2) Pilotage Act, 1913, United Kingdom). The reason for this modification is indicated in Temperley's *Merchant Shipping Acts* (fifth edition, p. 570). It resulted from the recommendations of the Departmental Committee appointed in 1909:

"The control given to the Board of Trade over the byelaws made by pilotage authorities was found to be inadequate, no initiative being exercisable by the Board and considerable uncertainty existing as to the necessity for confirmation by the Board of byelaws of certain authorities.

The Pilotage Act, 1913, now contains the general principles regulating pilotage in all districts The Act, too, empowers the local pilotage authorities to make byelaws applying the general principles therein contained to local conditions, subject to the effective control of the Board of Trade, assisted by a Pilotage Advisory Committee."

Since the privilege of passing legislation is exceptional for any authority other than Parliament, the terms of any delegation must be contained in the enabling Act and must be interpreted restrictively; furthermore these provisions must not be considered separately but must be read and understood within the whole context of the Act. Therefore, any regulation which does not clearly come within one of the enumerated subject-matters or which exceeds the imposed limitations is *ultra vires*, as is also any regulation which,

at first sight, comes under the delegated powers but which is inconsistent with the permanent and general provisions of the Act (unless it is clearly indicated in the Act that this is the intention). It is illegal to amend by regulation an Act of Parliament unless the right to amend has been specifically authorized by Parliament (e.g. sec. 347, C.S.A.).

In the Supreme Court decision of *McGillivray v Kimber et al.* (1915, 52 S.C.R. 146), Mr. Justice Idington stated regarding a By-law of the Sydney Pilotage Authority purported to be passed under subsec. 433(g), 1906 C.S.A. (now subsec. 329(g), C.S.A.):

“The By-law No. 9 so enacted and apparently intended to be within said power of enactment cannot in law be extended beyond the powers given to enact it . . . it might be treated as null by reason of being in excess of the power given . . .”.

For these reasons, as is further demonstrated hereunder, the By-laws now in force in various Pilotage Districts contain numerous ultra vires provisions.

Subject-matters of regulation-making powers

I. Form of regulations

The subject-matters of a Pilotage Authority's regulation-making powers are contained in subsec. 327(2), secs. 329, 330 and 339, subsec. 346(c), sec. 347, subsections. 349(1)(b) and 357(2), C.S.A. The Act requires these regulations to be in the form of “by-laws”, except for exemptions (secs. 346 and 347 (not subsec. 357(2))), fixing renewal fees (sec. 339), and establishing boarding areas (subsec. 349(1)(b)), for which no mention is made of the form the regulations are to take. It is difficult to understand why there is a distinction, especially now that the question is mostly academic since the Act imposes the same control on all regulations, i.e., the Governor in Council's confirmation is required (subsec. 331(1)).

The main differences appear to be that the orders in subsec. 346(c), sec. 347 and subsec. 349(1)(b) create rights, do not carry a penal sanction, and apply to persons not belonging to the pilotage service. On the other hand, the By-laws concern the internal organization and personnel of the service, while their effect on ships is only indirect. If by-laws are infringed there is a penal sanction (secs. 330 and 331). Subsec. 357(2) is a groundless exception for two reasons: although it deals with the withdrawal of an exemption, the regulation need not take the form of a by-law but the requirement of confirmation by the Governor in Council is not spelled out as it was for the others. The only logical explanation is inconsistency in drafting since it is a recent amendment to the Act (1956, 4-5 Eliz. II c. 34).

Sec. 339 is also an exception, due partly to historical development and partly to poor drafting. Originally, all licences were permanent, i.e., they were valid until the pilots reached the age limit of 65, after which a licence,

valid for one year, was issued and could be renewed annually (*no age limit*—sec. 38, 1873 Act) as long as the pilot was considered fit to perform his duties. While a fee fixed by by-law was payable when a permanent licence was issued, no fee could be demanded for a renewal after 65. In 1875 (45 Vic. c. 32, s. 5) the Act was amended to authorize the issue of term licences, valid for not less than two years, instead of permanent licences. This amendment was not applicable to the Districts of Quebec, Montreal and Saint John. By-law legislation was not required. The Authority concerned was then authorized to fix, with the consent of the Governor in Council, fees for the renewal of these term licences and a covering by-law was not required. Annual licences issued to overage pilots remained free. Except for the extension of the right to issue term licences to all Districts (sec. 434, 1927 C.S.A.) the situation remained unchanged until 1934. The 1927 C.S.A. made it clear that annual licences to overage pilots were issued free of charge since sec. 345 did not apply to sec. 432 but only to sec. 434. The 1934 Act made the question of issuing term licences a matter to be regulated by by-law by transferring the 1927 sec. 434 to the section dealing with by-law subject-matters, i.e., sec. 319 (now sec. 329 C.S.A.) where it became subsecs. (n) and (o), but sec. 435, 1927 C.S.A. authorizing the establishment of a fee was neither transferred nor deleted. Secs. 433 and 434, 1927 C.S.A., having been deleted, the former sec. 435 became the section next following the former sec. 432 (i.e., secs. 328 and 329, 1934 C.S.A.) (secs 338, 339 C.S.A.) to which, since its wording remained unchanged, it automatically applied. Therefore, for the first time, Pilotage Authorities were empowered to impose a fee for the annual licence issued to overage pilots as a renewal of a permanent licence. It is not believed that this was intended. Here again, it appears that the obvious explanation is poor drafting. In any event, it has remained a dead letter because no Pilotage Authority has taken advantage of sec. 339 (sec. 329, 1934 C.S.A.).

On account of the different wording in the Act, secs. 330 and 331, which provide the penal sanctions for breaches of by-laws, can not apply to the violation of orders made under secs. 346, 347 and subsec. 349(1)(b). The fact that these orders have been formulated in the by-laws does not make them by-laws, although they remain regulations to which the penal sanctions of secs. 330 and 331 do not apply.

Despite this fact, there seems to be no practical objection if all legislation affecting Pilotage Authorities takes the same form because there are many matters that have to be dealt with by by-laws which can not possibly carry a penal sanction, e.g., delegation of powers (subsecs. 327(2) and 329(p)) and fixing the tariff (subsec. 329(h)). Indeed, this is the form Pilotage Authorities have always used. It has the practical advantage of grouping in one document all District regulations. As stated above it is considered that the word "regulation" would be more appropriate than "by-law".

The legality of all existing By-law provisions dealing with *exemptions* is questionable because of the procedure being followed. Every Pilotage Authority By-law now in force carries only limitative confirmation by the Governor in Council pursuant to sec. 329, thereby restricting the scope of approval to the subject-matters enumerated in that section in which exemptions are not included. There would be no difficulty if subsec. 331(1) alone were quoted as authority, or at least sec. 347 together with sec. 329. Originally, such approval was given without reference to any particular section of the Act; later, the practice was adopted of specifying in the Order in Council the section or sections which were being applied. In the Quebec District, the last of such approving orders is P.C. 3415 of July 19, 1950, which was then made and approved under both secs. 319 and 329 of the 1934 C.S.A. (now secs. 329 and 347 C.S.A.). But this practice has since been modified and only sec. 329 is quoted as authority, thereby implying that approval is given only to the By-law provisions the Pilotage Authority had power to make under 329, and rendering those made pursuant to subsec. 346(c) and sec. 347 inoperative for lack of approval. The withdrawal of an exemption amounts to depriving some ships of a statutory right and, therefore, can not be effected except by following strictly the prescribed procedure which includes the direct and unambiguous approval of the Governor in Council.

Lack of uniformity in wording which refers to the same concept or the same procedure is an unnecessary source of confusion which should be avoided. It is considered that all the legislation effected through the exercise of delegated powers by Pilotage Authorities should be referred to only as "regulations" and that the procedure for their adoption should be enunciated in only one set of provisions in the Act, which would be of general application. If in some exceptional cases it is felt necessary to add requirements or to modify the general procedure, *ad hoc* provisions should be passed with a specific notation to the effect that it is an exception to the rules specified in the general provisions.

II. Nature of subject-matters for regulations

The legislative power of a Pilotage Authority is mostly concerned with its licensing function, i.e., establishing licensing requirements which are peculiar to a given District.

This power does not extend to matters that may affect *third parties*, that is, the public in general and even those indirectly connected with the service, such as tugs, line boats, stevedores, and vessels not taking pilots. When orders to third parties were indicated, care was taken that the appropriate provisions were included in the Act itself, e.g. subsecs. 337(2), (3) and secs. 341, 342, 344 and 371.

A Pilotage Authority has only limited legislative power over a pilotage contract, i.e., fixing the rates of pilotage dues (subsec. 329(h)), and adjusting disputes (subsec. 329(k)). A Pilotage Authority is powerless to deal with questions affecting the rights, duties and responsibilities of both parties to the pilotage contract, i.e., the pilot and the ship. Any additional legislative intervention into pilotage contracts was considered of a general nature which could not be affected by the peculiarities of a given District and, therefore, the field was fully covered by Parliament in the Act itself (*inter alia*, secs. 341-343, 352, and 359-362).

It was reasonable that the power to fix the scale of pilotage dues should be delegated to each Pilotage Authority because, as seen in chapter 6, the rates must perforce vary from place to place and the nature, extent and circumstances of the services performed make it impossible to set up a uniform tariff. This subject can not be adequately covered except by specific legislation for each District. If such legislation was contained in the Act itself, numerous and periodic amendments would become necessary in order to keep the tariff of every District adjusted to ever-changing local and economic conditions. Before Confederation, in Lower Canada where the two Pilotage Districts, then known as the Ports of Quebec and Montreal, were governed by their own separate legislation, there was no distinction between general and special provisions in the legislation. Also, at first, Parliament dealt with the rates, with the result that a great number of amendments to these Acts were for the sole purpose of bringing in tariff modifications. This procedure was soon amended by delegating to the Pilotage Authority the power to fix rates. This has been the situation ever since. (Vide Quebec and Montreal districts, *History of Legislation*.)

Disputes are normally adjusted in the regular courts, unless an arbitration clause is contained in the contract. Parliament has authorized each Pilotage Authority to make regulations that would be the equivalent of such an arbitration clause and which would lay down a procedure suited to the type of organization and the circumstances in each District. This intervention into the pilotage contract is warranted because in most cases one party to the contract is a foreign ocean-going ship on an outward voyage which should not be unduly delayed. If such arbitration procedure is provided, a dispute may be settled without legal action and as soon as a complaint is received.

Since a Pilotage Authority has no other regulation-making power over the pilotage contract the following By-laws are *ultra vires*: (a) dealing with, or affecting, a ship's right to choose a pilot, (b) forbidding pilots to undertake pilotage except through a method of despatching over which they have no control, (c) depriving a pilot of the right to receive that part of the dues that is payment for the services he has rendered, by either creating a compulsory pooling system, or by making the pilots employees of the Authority. These questions will be studied later in the Report.

A Pilotage Authority has no legislative power over ships except in a limited way concerning the pilotage contract, as seen above, and with regard to the establishment of boarding stations in compulsory payment Districts (subsec. 349(1)(b)). It can not enforce by regulations the obligation to give notice of requirement of a pilot, nor request a ship to detour from her route to pass by or through a boarding area, nor lay down a procedure to facilitate the boarding and disembarking of pilots. As seen earlier, the Act itself contains provisions of this nature. Pilotage Authorities are not authorized to enact additional legislation which adds requirements for their Districts.

COMMENT

It is believed that, in the interest of safety and of the efficiency of the service, legislative power over the above matters should be delegated to each Pilotage Authority, provided a vigilant confirming authority ensures that unreasonable requirements are not imposed on shipping.

III. *Analysis of subject-matters for regulations*

Observing that various Pilotage Authorities have abused their legislative powers, and with a view to appraising the suitability in present circumstances of the various matters which might form subjects of regulations, each subject-matter will be studied separately under four topic headings.

1. LICENSING FOR PILOTAGE. A licence is a guarantee to the public that the licensee possesses, and continues to possess, as long as the licence lasts, the necessary standard of technical, physical and moral qualifications which entitles him to be entrusted with the responsibility of navigating ships within a given Pilotage District.

Meaning of the term "licence". For the licence-holder, the licence establishes his right and privilege to act as pilot as defined in legislation. The creation of Pilotage Districts has restricted the exercise of the pilotage profession to those who hold a licence and the imposition of the compulsory payment system has made non-exempt ships liable to pay dues, even though a pilot is not employed. An exception is made when the Master or one of his officers holds a pilot's certificate issued by the Authority of the District concerned. It is a misnomer to use the word "licence" in respect of apprentices because the certificate given to them does not authorize them to perform the act of piloting. Since the apprenticeship stage is merely one of the prerequisites for licensing pilots, the licensing of an apprentice is merely an acknowledgment on the part of the Pilotage Authority that a successful candidate possesses the basic qualifications required and has been accepted as an apprentice. It is considered that "indenture" would be a more appropriate term than "licence".

The term "licence" also means the instrument issued to a pilot as proof of his licensing (C.S.A., secs. 333 to 339 inclusive). When the Quebec and Montreal Trinity Houses had pilotage responsibilities this instrument was known as a "branch".

Licensing power is not discretionary, but is governed by rules contained in legislation (both statutory and delegated) concerning:

- (a) definition of required standard of qualifications;
- (b) matters affecting licensing power;
- (c) definition and limitation of rights conferred by a licence;
- (d) obligations and responsibilities of licensees.

(a) *Standard of qualifications for pilots* (subsec. 329(a)). The Act does not define the qualifications a pilot must possess, which leads to the conclusion that Parliament felt there were no requirements of general application. The responsibility for determining such qualifications is left entirely to the legislative power of each Pilotage Authority to ensure they are drafted to meet the individual needs of each District.

Subsec. 329(a) enumerates some qualifications that ought to be covered in the regulations but the list is not complete, viz., "in respect of age, time of service, skill, character and otherwise required . . .". This enumeration clearly falls within the *ejusdem generis* rule and, therefore, the generality of the last word is limited by reference to the preceding text. Hence, the only requirements that can be imposed upon candidates are those likely to ensure that they have the required standard of knowledge and skill to take charge of the navigation of ships within the District concerned, i.e., standards of physical and mental fitness, age and reliability. Residence, domicile, race and nationality have no bearing on the ability of a person to navigate. Therefore, the following By-law provisions are ultra vires as discriminatory: Bathurst (subsec. 10(b)) which requires that "the candidate be a Canadian citizen resident in the County of Gloucester"; Botwood (subsec. 10(b)) which specifies "a Canadian citizen resident in the Province of Newfoundland"; New Westminster (subsec. 12(a)) which prescribes "a Canadian citizen resident in the Province of British Columbia for at least two years immediately prior to licensing".

All by-laws deal at length with technical qualifications; this fact raises the questions of minimum requirements and apprenticeship.

Since the Act does not fix any *minimum professional requirements*, they are determined by each Pilotage Authority. The result is that in some Districts even a Master or mate's certificate is not a basic requirement for a person whose licence will nevertheless vouch for his knowledge and ability to navigate any ship in the District. Most By-laws call for the possession of a certain official certificate of competency, but the By-laws of the following Districts do not require any marine certificate and, in fact, do not even

require proof that the candidate can take charge of a ship: Botwood (By-law secs. 10 and 11), Port aux Basques (By-law secs. 10 and 11), Prince Edward Island (By-law secs. 8 and 10), Pugwash (By-law secs. 10 and 11) and Restigouche River (By-law secs. 10 and 11). The seriousness of the situation is compounded when it is considered that in all these Districts, except Prince Edward Island, Masters are encouraged, if not coerced, to employ these pilots by the implementation of the compulsory payment system. This is tantamount to misrepresentation and endangers the safety of ships.

Each Pilotage Authority is authorized to require by regulation that a candidate submit to a system of training designed to provide the necessary technical qualifications, i.e., to serve an *apprenticeship*. The Authority need not resort to such a system of training if it has at its disposal an available pool of qualified mariners who are experts in local navigation, such as in the B.C. District. Here, the equivalent of an apprenticeship is attained by the experience acquired as a navigator within the District for a period of years or months, which is one of the basic requirements. On the other hand, in Districts such as those on the St. Lawrence River where local experts do not exist in sufficient numbers, and where it takes long, intensive training to acquire the necessary knowledge and skill, an apprenticeship system is indicated. If the sole aim of apprenticeship is to develop knowledge and skill in local navigation, a Master's or mate's certificate of competency is a prerequisite to being accepted as an apprentice.

The physical, mental and health requirements for apprentices appear to be standard for all Districts because in all By-laws they are, in substance, identical, i.e., passing eyesight and hearing tests, and being in good physical and mental health. There is one exception: the usual eyesight and hearing standards are not a requirement for Churchill, which is obviously an omission.

The question of reliability is treated very briefly: no By-law asks more than that the candidate be "of good character", despite the fact that a pilot is in a position of trust with great responsibilities. Here again, there seems to be no reason for any variation in requirements from one District to another.

COMMENTS

As seen above, many of the qualifications are common to all Districts and must be possessed by all pilots. It is, therefore, considered that where such uniformity exists, the responsibility for legislation should not be left to the discretionary power of the Pilotage Authorities but should be included in the Act. Among the requirements of obvious general application are standards of eyesight, hearing and health.

Although pilotage requirements vary from District to District a minimum compulsory requirement should be imposed by the Act, with latitude

for each Pilotage Authority to raise the standard in its District. Since a pilot is by definition able to take charge of the navigation of a ship (subsec. 2(64)), and since his licence confirms this knowledge and skill, the Act should stipulate his minimum certificate of competency.

On the subject of reliability, the Act should contain provisions which deny a licence (unless permission is granted by some designated higher authority), to any person, (i) whose record at sea is unsatisfactory, (ii) whose licence has been cancelled in another District for disciplinary reasons, (iii) who has been established as a safety risk. Habits, or evidence of habits, which are detrimental to the exercise of the pilotage profession should also prevent a licence being issued.

It is further considered that where it is most difficult or unnecessary to recruit persons who hold a minimum certificate of competency, because navigational conditions are such that only advisers on local conditions are needed, the Act should provide for licensing advisers rather than pilots. This would solve the problem facing most small port Districts and the Prince Edward Island Pilotage Authority which is obliged to require its pilots to warn Masters employing them that they are not qualified to berth or unberth a ship.

(b) *Standard of qualifications for pilotage certificates.* When Masters and mates apply for pilotage certificates the Pilotage Authority is given no power to determine by regulation the qualifications they are expected to hold. Former legislation contained such a provision, i.e., an applicant was judged by his ability to pilot the ship of which he was Master or mate, anywhere in the District (sec. 467, 1927 C.S.A.). This provision, together with all other pertinent sections regarding the issue of pilotage certificates, was deleted from the Act when it was rewritten in 1934 and the whole subject was delegated to the regulation-making power of each Pilotage Authority, except for qualifications on which the Act is silent.

The only existing, or possible, prerequisites for Masters and mates are those fixed indirectly by the Act itself, i.e., the applicant:

- (a) is duly qualified to act as Master or mate in the type of ship to which he belongs;
- (b) is employed as Master or mate in such ship;
- (c) has a working knowledge of the navigational conditions and peculiarities of the District, i.e., can navigate his ship throughout the District.

Since the pilotage legislation of Part VI C.S.A. was mainly conceived for the convenience of shipping, Pilotage Authorities did not have to consider such requirements as age, length of service or character, because a pilotage certificate entitles the holder to pilot only the ship in which he serves (vide also p. 265).

Here again, a Pilotage Authority can not make discriminatory regulations, e.g., by limiting a certificate to officers of ships of Canadian registry or of certain types of coastal or local trader. Under present legislation, if a By-law contains provisions for issuing such pilotage certificates, the Pilotage Authority, as licensing authority, is bound to license any Master or mate who meets the requirements and has no discretion on the matter. But a Pilotage Authority is not bound to accept the certificate of competency of a foreign Master or mate and may require proof that the Master or mate has the competence required of a Canadian Master or mate for the type of ship to which the foreign applicant belongs and, if necessary, may require him to pass a prescribed examination. The expression "masters and mates" in sec. 329 must be interpreted according to the definition in the Canada Shipping Act, or the equivalent.

(c) *Licensing procedure* (subsec. 329 (d)) and *form of licence* (subsecs. 329(e),(f)). Licensing is, first, the process whereby a Pilotage Authority selects pilots or, in other words, ascertains that they possess the required qualifications. It also comprises the reappraisal function and implies surveillance powers to ascertain that licensees maintain the required standards (vide C. 9 for details).

The wording of subsec. 329(d) creates a problem of interpretation. If this provision is to be retained, it should be redrafted. It now reads as follows:

"329. Subject to the provisions of this part . . . every pilotage authority shall . . . have power . . . by by-law confirmed by the Governor in Council, to . . .

(d) license pilots and apprentices, and grant certificates to masters and mates . . . as hereinafter provided;"

The wording of the essential part of this subsection corresponds verbatim to the original 1873 version. If taken literally, it means that licensing power is to be exercised by by-law, i.e., that a special by-law is necessary each time a pilot or an apprentice is licensed and each time a pilotage certificate is issued to a ship's officer.¹ In that case, the by-law would constitute the issuance of the licence. In theory, it is not incompatible to effect an appointment by legislation such as an Act of Parliament and, therefore, licensing could be done each time by regulation if Parliament gave each Pilotage Authority the necessary power. However, in practice, Parliament never resorts to such a procedure and, as a rule, the power of appointment is made the responsibility of an executive authority.

In any event, such a procedure has never been followed for licensing pilots and, furthermore, it would be inconsistent with the other provisions of

¹This stand was taken in an *obiter dictum* contained in a recent judgment of the Exchequer Court (Ex. Court No. B-1334, Gamache vs Jones *et al*, Noël J., dated October 10, 1967, Ex. 1521b. Notice of appeal filed Dec. 1, 1967).

the Act, e.g., subsec. 333(1), which stipulates that licensing is to be effected by the Pilotage Authority issuing a licence and, therefore, not by passing a by-law. Subsec. 333(1) reads as follows:

“333(1). Every pilot after being approved for licensing shall receive a licence in the form determined by the pilotage authority.”

It is obvious that it is the process of licensing which is to be the subject-matter of the regulations: subsec. 329(a) defines the standard of qualifications a candidate is expected to meet to be licensed; subsecs. 329(e) and (f) define the rights and obligations a licence confers as well as its limitations. When subsec. 329(d) is read in this context, it must refer to the process of approving candidates for licensing, i.e., the procedure for examining and selecting candidates.

In every District where an apprenticeship system exists the By-law contains provisions governing pilots and apprentices but, at present, as seen earlier, no By-law contains any provision enabling a Pilotage Authority to grant a pilotage certificate to a ship's officer. This omission could easily be remedied by adopting regulations similar to those drawn up for pilots.

Normally, pilotage examinations should be carried out by the Pilotage Authority itself, as, for instance, the Trinity Houses used to do in the presence of any branch pilot who wished to attend. At present, this is no longer the rule and it would be a practical impossibility in Districts where the Minister is the Pilotage Authority. Examinations are carried out by a Board of Examiners appointed for this purpose by the Pilotage Authority pursuant to a delegation of power the Pilotage Authority is now authorized to make (as will be seen later (subsec. 329(p))), and the topics are defined in the District By-law.

(i) *Restriction on licensing power.* The last words of subsec. 329(d) qualify, by reference to the two following subsections, the nature and limitation of the licensing power of a Pilotage Authority, i.e., the number of licences and the rights the licences or certificates confer on the licensees. The question of the terms and conditions of the licence will be studied later but the number of pilots is studied hereunder.

The power of licensing is not arbitrary. The Pilotage Authority is bound by legislation which determines the eligibility and qualifications of the candidates, e.g., if the regulations do not contain any limit as to age, sec. 338 precludes licensing a person 70 years of age or over.

(ii) *Number of licences.* This power is also limited as to the number of licences valid at a given time, provided the number is limited by by-law in accordance with subsecs. 329(e) for pilots and 329(f) for apprentices.

It is only by exception that the number of persons admitted to the exercise of a given profession may be limited and, in the absence of a specific, legal provision to that effect, the licensing authority not only may

issue an unlimited number of licences, but must accept every candidate who is able to prove he is qualified. The profession is then open in the same way as the legal and medical professions. If, for some compelling reason, the number of licences must be limited, this can be done only by passing appropriate legislation. Since the pilots' profession has evolved from a service merely for the convenience of shipping to one of public interest, the conditions of the profession must be attractive enough to appeal to the best qualified candidates, *inter alia*, by assuring them of adequate revenue, reasonable working conditions and a certain degree of security. This aim is achieved by limiting their number to those necessary to meet the demands of the expected users and fixing the rates accordingly. The same principle applies to apprentices because an excessive number diminishes their chances of being licensed and discourages serious candidates. Since this situation obviously does not apply to Masters and mates who apply for certificates to pilot their own vessels, the power to limit their number is not given to Pilotage Authorities.

Formerly, the pilot's profession was open everywhere and at any time any candidate who felt he was qualified was entitled to ask to be examined and licensed if he passed the examination. For instance, in 1860, when the Quebec pilots obtained their incorporation, they numbered 280. With the arrival of steamships which were faster than sailing vessels, thereby shortening the duration of their trips, and were also much larger, thereby reducing the number of ships, the number of pilots exceeded the demand and, in order to maintain both a high standard of qualifications and a reasonable level of income, steps had to be taken to limit their number. Although the Quebec Pilotage Authority had the right to regulate the number of pilots, Parliament intervened by depriving the Pilotage Authority of its licensing power as long as their number exceeded a permissible maximum fixed in the Act; e.g., sec. 443 of the 1906 C.S.A. provided that the number of pilots for the Pilotage District of Quebec was not to exceed 125. Subsec. 329(e) of the present Act contains no provision limiting the number of pilots in any District and the question is left to be determined by each Pilotage Authority in its regulations.

The By-laws of all Pilotage Districts, except Churchill, contain a provision aimed at limiting the number of pilots. However, in all cases except Quebec, this provision is illegal and *ultra vires*, and the Quebec District provision, although legally correct, is out of date and is not followed.

The point being overlooked is that fixing the number of pilots is a legislative but not an administrative prerogative, and rightly so because under the organizational scheme of Part VI this factor directly affects the earning capacity of pilots and their working conditions. The number must be fixed in the regulations, either directly by providing for a fixed number, or indirectly by enunciating the criteria for determining the number with no discretionary power. It can not be otherwise fixed by regulation.

No District fixes a definite number of pilots in its By-law. The Quebec District By-law does so indirectly by stating how the number should be calculated objectively. Subsec. 4(1) reads as follows:

“The number of pilots shall be determined by the Authority after consultation with the Pilots’ Committee and may be approximately one for every 70 trips per annum.”

This criterion dates back to the 1928 By-law. Its provisions corresponded more to the legal requirement in that it left less discretionary power than the present regulation. It read as follows:

“24. The number of pilots to be licensed in the Pilotage District may be determined by the Pilotage Authority from time to time on the basis of fifty pilots for each 3,500 trips per annum”.

The criterion has remained unchanged since 1928 despite the fact that working conditions, and the length and duration of pilotage assignments have changed considerably. In 1928, 70 trips from Father Point, Quebec, or the equivalent, was considered a reasonable annual maximum workload but now the pilots average over 110 trips per year. Due to the fact that the criterion was never amended, it is now completely out of date and to follow it would produce an excessive number of pilots. The obvious remedy was to bring in the necessary amendments, but despite the fact that the provisions of By-laws, once approved by the Governor in Council, are as binding upon the Pilotage Authority and other parties as is the Act itself, the Pilotage Authority has chosen to act illegally by ignoring this legislative provision and making the appointment of any new pilot, whether he is merely a replacement for one that has left or is to increase numbers, the object of an *ad hoc* administrative decision. This attitude has caused the pilots, the shipping interests and all the officers of the Pilotage Authority enormous loss of time and money, and almost every new appointment causes contention, endless negotiations and ill-feeling (*vide Quebec District*).

In all other Districts (except Churchill), the By-law provides that the number of pilots is at the entire discretion of the Pilotage Authority, sometimes after consultation with the Pilots’ Committee. This regulation and also that part of the Quebec regulation which leaves a certain discretion to the Pilotage Authority, is *ultra vires* because it amounts to amending the Act by making what is supposed to be a subject of legislation the subject of an administrative decision. Such action can not be taken except through a specific provision in the Act, and none exists. For lack of authority, such By-law provisions are inoperative and, as a result, in all these Districts the pilots’ profession is now open and the Pilotage Authorities can not refuse to license any qualified candidate who may so request.

COMMENTS

It is on account of such illegal and unwarranted increases in discretionary executive powers that Pilotage Authorities have lost their control. Since they lack legislative criteria or provisions on which to base decisions they are eventually obliged to yield to pressure, often against their better judgment. This situation is incompatible with the exercise of authority. The interests involved are too vital to the parties concerned for their fate to be left to arbitrary decisions. The method devised by Parliament is rational and adequate and must be followed even if the pilots are quasi-employees, i.e., when their remuneration is a share of the pooled revenues of the District. The situation is materially different when the pilots are employees receiving a fixed, pre-determined salary. In that event, the only question concerns working conditions, which should not be resolved by legislation but by administrative decisions on the part of the Pilotage Authority and by contractual agreements between pilots and Authority.

It has been explained that the Quebec criterion is difficult to apply in that it implies annual changes in the number of pilots on account of periodical fluctuations in traffic which result in an excessive number of pilots at times. All this may be true, but the fault is not the requirement of the Act but the procedure adopted in the regulations. If the Quebec criterion is not adequate, other rules that would meet all objections could easily be devised, e.g., by making temporary appointments for a number of years until the traffic increase proves to be permanent or otherwise and, possibly, by always keeping a certain percentage of licences on a temporary basis to allow for necessary adjustments in case traffic decreases, provided the number of licences, permanent and temporary, is fixed in the regulations. The necessary criteria should be enunciated in the regulations, *inter alia*, when considering the permanency of an increase in traffic, factors of a temporary nature, such as strikes and special non-recurring traffic, should be disregarded.

With reference to the method provided in the Act, the only remaining question is to revise criteria from time to time. Whenever a vacancy occurs, whether permanent or temporary, the appointment of a new pilot should be made according to the regulations as a matter of administrative routine that can be automatically attended to by the local staff.

(iii) *Form of licence or certificate.* The form and content of licences and pilotage certificates are left to be determined by regulations drawn up by the Pilotage Authority (subsecs. 333(1) and 329 (e)). Normally they should vary from one District to another to reflect local exigencies.

Previously, the form of both documents was determined by Parliament. In the 1927 C.S.A. they were appendices Q and R of the Act (secs. 425 and 468, 1927 C.S.A.) and sec. 434 provided for the necessary amendment to be made when a Pilotage Authority decided to limit the duration of a licence. In 1934, these appendices were deleted, and determining the form of the licence

and the certificate was made the subject-matter of regulations by an insertion in subsec. (e) of sec. 329. The result is that no licence can be considered official unless it conforms to the pattern set down in the By-law. The previous statutory forms are no longer legal because they were repealed in 1934. Strangely enough, this subject-matter is not dealt with in any existing By-law with the result that no pilot in Canada holds a legal pilot licence, except those whose licences are dated prior to 1936, i.e., the year the 1934 Act came into force. The consequence is that all provisions wherein the word "licence" means the official instrument are no longer capable of application. *Inter alia*, it is no longer an offence for a licensed pilot not to carry his licence with him when acting as a pilot and refusing to exhibit it when duly required (sec. 335); nor if he fails to deliver it when his right to pilot has been either cancelled, or suspended, or he is compelled to retire (subsec. 337(1)). Determining the form licences and certificates will take is not a matter of executive decision but of legislation.

COMMENTS

This is another flagrant example of the way delegated legislative powers are neglected by persons who are so involved in their executive duties that their legislative responsibilities suffer. In the light of experience, it is believed that the only remaining solution is, as stated earlier, whenever a matter has to be covered in legislation, to include in the Act itself a prototype provision which will apply in all cases except where it is amended by regulations enacted by various Pilotage Authorities to meet their requirements. The power to alter such a statutory provision must be stipulated in the Act.

(iv) *Licensing fees.* The fees a Pilotage Authority is authorized to charge by subsec. 329(e) are for issuing a licence or certificate. This practice is followed in a number of Districts but the By-laws also often impose on all candidates an examination fee as a requirement to be admitted to the examination. This fee is not returned if the candidate fails. This examination fee is illegal because it is not authorized by any specific provision of the Act. It becomes an item of revenue for the Pilotage Authority which is an agent of the Crown and the Crown can not charge the public unless there is a specific, valid, legislative provision to that effect, e.g., sec. 18 of the Financial Administration Act, or the above-mentioned provision for fixing licence fees in subsec. 329(e) C.S.A.

No fee is fixed in any By-law for issuing pilotage certificates, and none can be fixed because, in the absence of enabling regulations, no Pilotage Authority can issue such a certificate. In the past, fees were never nominal, e.g., at one time in the B.C. District \$100 was charged for a pilotage certificate of one year's duration. This was considered a contribution by the ships concerned toward District operating expenses.

COMMENTS

The basic aim of the licence or certificate fee is to repay examining costs incurred by the Pilotage Authority. It may be reasonable to require a fee from those who are licensed, but it is not normal to charge candidates because it is in the public interest to encourage them to take the examination. Most of the candidates forfeit their examination fees when there are only a few vacancies to be filled. The fact that the examination fees now charged are minimal does not alter the situation: the principle is wrong.

It is believed that licence fees still exist only for historical reasons and that they should now be abolished. Indeed, formerly it was the current practice to charge a fee whenever a licence, certificate or other official document was granted. There is no reason to continue this practice for pilots' licences, all the more so because the annual aggregate revenue from this source in any District is minimal. The small expenses incurred in the licensing process should be debited to District expenses, and eventually paid by the shipping interests for whose benefit the pilots were licensed.

The same reasoning, however, does not apply to pilotage certificate fees. The cost of both the examination and the pilotage organization from which their ships benefit can not be passed indirectly to shipowners because the pilotage certificate held by one of their Masters or mates makes them, in effect, exempted ships. It is reasonable that the fee for this type of certificate should be substantial on the basis that it is a contribution by shipping toward maintaining a pilotage service.

(d) *Terms and conditions of licences.* Once granted, a licence or pilotage certificate is, in effect, an acquired right: for the pilot, it is the right to exercise his profession; for the ship's Master or mate, it is the right to navigate his own ship without a pilot and to exempt her from pilotage dues.

Like any other right, this is absolute and permanent unless, when acquired, it was limited by legal terms and conditions. In the case of licences, these terms and conditions must be contained in the Act governing the licensing authority and in the regulations as they existed at the time of licensing. These terms and conditions become part of the licence for its duration and any later amendment to the regulations can not affect these acquired rights except (a) with the consent of the licence holder, or (b) if made pursuant to a condition that existed at the time of the licensing or (c) by a specific amendment to the Act. To introduce modifications in any other way would amount to a denial of the rights conferred by the licence.

The principle of the permanency of the terms and conditions of licences was infringed when the grade system was created in the Quebec and Montreal Districts, insofar as it limited existing licences to Grade B, and made the licences of the few pilots who were classified as Grade A subject to reclassification as Grade B in certain circumstances. The pilots who were licensed afterwards have no grounds for complaint because the grade system was part of the terms and conditions of the licence they received.

As was stated by the Supreme Court, in the judgment *McGillivray v Kimber et al.* (1915, 52 S.C.R. 146), the relationship of master and servant does not exist between the Pilotage Authority and the pilot; the Pilotage Authority is merely a licensing authority with only a statutory control over the licensing of pilots, and the Pilotage Authority has no arbitrary authority to interfere with the pilot's rights as a licensee. Mr. Justice Anglin put it this way:

"The relationship of master and servant does not exist between the Board and the pilot. The Board has a statutory control over the licensing of pilots within the territory for which it is constituted. Its jurisdiction to cancel a pilot's licence is also statutory and arises only after it has been satisfied either by a quasi-judicial investigation, held after fair notice has been given the pilot and he has had reasonable opportunity to make his defence (. . .), or by the production of a conviction thereof made by a competent tribunal, that the commission of an offence subjecting the pilot to cancellation of his licence has been established".

Terms and conditions can be grouped in three categories:

- (a) subjective and implied, that is, the pilot remains what his licence purports him to be, i.e., a skilled expert in local navigation, mentally and physically fit, and reliable;
- (b) those determining objective duration of the licence;
- (c) those determining the extent of right as to territory and capacity.

(i) *Terms and conditions as to territory and capacity.* The first two categories are governed by other provisions and will be studied later; (for (a) vide p. 271, for (b) vide p. 264. The terms and conditions of the third category are dealt with in subsec. 329(e) C.S.A.

For pilots' licences, only three types of such terms and conditions are contained in the By-laws presently in force:

- (a) limitation as to territory;
- (b) limitation as to earning capacity;
- (c) limitation as to grade.

A. *Limitation as to territory.* The right of a Pilotage Authority in this regard is limited by the extent of its jurisdiction, for instance, the maximum limit of a licence as to territory is the extent of the district limits, and if the Pilotage Authority is the Minister appointed as such for part of a District only under subsec. 327(1), the licences he grants are valid only within his territorial jurisdiction. However, a licence may be issued for only part of the District (sec. 333). Licences that do not extend throughout the District exist only in the Montreal District and in the Prince Edward Island District.

In the Montreal District, the By-law (sec. 43) provides for issuing two types of licence: a river pilot's licence which is unlimited as to territory, and a harbour pilot's licence which is valid only within the harbour limits as defined in the By-law. In addition, by an organizational arrangement not reflected in the By-law, the river pilots are divided into two groups with the

Three Rivers boarding station being the changeover point. But the division and restriction are not noted on the licence which, therefore, remains valid for the whole District including both terminal harbours of Quebec and Montreal. In practice the restriction is maintained by the despatching system to which the pilots are subjected.

The Prince Edward Island By-law provides for the issuance of a limited licence but, contrary to the statutory requirements, the limitation is not defined in the regulations and is left to be determined in each case by the Pilotage Authority. This provision amounts to a blanket delegation of legislative power to be exercised by the licensing authority which, despite the generality of the terms of subsecs. 329(p) or 327(2), is not permissible, as will be discussed later (vide pp. 289 and ff.). In Prince Edward Island, the fact that the licences must be limited as to territory is the result of the artificial *sui generis* situation of this District which, in fact, is a merger of various harbour Districts with their own independent, separate pilotage services in no way related to one another. This situation is not foreseen in the present Act. Until the Act is modified, this situation could be covered and the By-law legalized, by stipulating that licences are to be issued on the basis of harbours, i.e., valid for the limits of one harbour and its approaches or for more than one in accordance with the application made by a candidate and the qualifications he possesses.

B. *Limitation as to earning capacity.* In many Districts, the first licence issued to a successful candidate contains restrictions on earning power. This is called a probationary licence (the question of its validity will be studied later, vide pp. 269 and 270. These By-laws generally pose a condition that the holder will not be entitled to receive the pilotage dues earned by his services but only an amount fixed by the Pilotage Authority at its discretion. This restriction is generally worded as follows:

"Probationary pilots shall receive compensation to be fixed by the Authority",

or as in the New Westminster By-law:

"10(2). The Secretary shall pay out of the Pilotage Fund each month the following:

...

- (b) the remuneration of probationary pilots shall be seventy-five per cent of a regular pilot's share of the current earnings from the date of his appointment for the period of his probation . . ."

It is unnecessary to belabour these points but it should be kept in mind that the relationship of master and servant does not exist between the Pilotage Authority and any pilot, that the Pilotage Authority has no control over the earnings of a pilot except for fixing the general tariff, that under the

present Act a pilot is a self-employed, independent contractor who is entitled to receive the full amount of all dues he has earned, less, as seen in chapter 6 *supra*, the legal deductions the Pilotage Authority is authorized to make from the earnings of all pilots. The Pilotage Authority is not authorized to discriminate against any group of pilots and there can be only one scale of pilotage dues. A specific provision in the Act itself was necessary when, in 1879 (42 Vic. c. 25), the Montreal Pilotage Authority was given the power to grant second class pilot's licences and, at the same time, was authorized to fix a special scale of dues for the remuneration of the services of these pilots. This exceptional provision was repealed when the Act was revised in 1934.

This limitation on the earning power of probationary pilots meets a need created by the operation of pooling the pilots' earnings, because probationary pilots do not bring into the common fund the same contribution as full-fledged pilots, since they are normally assigned to smaller ships. This problem does not arise where the pilot is paid his own earnings. This restriction is at present illegal because compulsory pooling itself is illegal; but if such pooling is allowed to exist a regulation to cover this point will be necessary.

c. Limitation as to grade. Licences may also be limited depending upon the degree of competence of the licence holders, i.e., the grade system which is based on the type and size of ships. This is found in the Districts of Quebec and Montreal only.²

The Quebec and Montreal grade system (not applicable to the Montreal Harbour pilots), provides a temporary Grade C which is, in effect, a continuation of apprenticeship after a permanent licence has been granted so that a newly appointed Grade C1 or Grade C2 pilot is gradually initiated into the art of piloting. He begins with small ships and proceeds to larger ships, provided his services have been satisfactory. In Montreal, this training period lasts a minimum of three years. The licence is permanent because, strictly speaking, apprenticeship is terminated, but a pilot may remain Grade C indefinitely if his performance does not warrant promotion either within Grade C or up to Grade B, the basic permanent grade, from which a pilot can not be demoted except by his own volition. The larger ships are the responsibility of a selected, highly qualified group called Grade A. This grade is not permanent because pilots revert to Grade B automatically at the age of 65 or whenever the Pilotage Authority considers they no longer possess the necessary high standards of qualifications (vide C. 9, p. 354).

This grade system is new as far as regulations are concerned, but it corresponds, to a certain extent, to the practice unofficially followed by the

² The Exchequer Court in a recent judgment held that the pilot's licence can not be limited as to professional competency under the present legislation and declared *ultra vires* the by-law provisions of subsec. 15(2)(a), 21(1) and 24(5) (P.C. 1960-756) of the Quebec District establishing the grade system (Ex. Court No. B-1334, Gamache vs Jones *et al*, Noël, J., dated October 10, 1967, Ex. 1521b. Notice of appeal filed Dec. 1, 1967).

pilots themselves in certain Districts, e.g., Saint John, N.B. and British Columbia where a probationary pilot starts with relatively easy assignments which gradually become more difficult and entail more responsibility. The most difficult assignments are, by common consent, given to the senior and most experienced pilots. However, especially where there is a large group of pilots, it is most desirable to recognize this sensible practice officially, and to embody it in regulations. The Quebec and Montreal system is new and an amendment to the Act would be required to apply the grade system in its entirety. For instance, while the Pilotage Authority has the right to cancel or suspend a pilot's licence, either following a conviction for a statutory or by-law offence, or a breach of disciplinary regulations, it has no power to lower grades except from Grade A to Grade B. This creates an inconsistency in that a Grade B pilot whose licence is suspended because his performance was unsatisfactory, must be reinstated in Grade B at the end of his suspension. He can not be demoted to Grade C1 or C2 in lieu of, or during, suspension which would provide him an opportunity to gain further experience before being given more responsible assignments. This matter is studied further in chapter 9, and also in that part of the Report dealing with the Districts of Montreal and Quebec.

Another question concerns the legality of the discretionary power purported to be given a Pilotage Authority, in its licensing capacity, to demote a pilot from Grade A to Grade B. There must be no discretion about the terms and conditions of a licence. If Grade A requires a higher standard of qualification, the rules for its approval should be set out in the Act, in which case approval itself becomes a quasi-judiciary function (i.e., part of the licensing function) of the Pilotage Authority as opposed to a discretionary administrative function. If a pilot's Grade A is queried he should be given an opportunity to defend himself. In order to have Grade A considered a privilege that could be withdrawn at the discretion of the Pilotage Authority, and not a right, the Act should contain an appropriate provision of exception.

The terms and conditions affecting the apprentice licence are not laid down because the so-called licence does not confer the right to do anything. Under subsec. 329(a), the Pilotage Authority already has power to determine the terms of apprenticeship which candidates must fulfill in order to obtain a pilot's licence.

For pilotage certificates issued to Masters and mates the Act contains a statutory condition, i.e., they are valid only for the ships to which the holder belongs. Each Pilotage Authority can enact by regulation other terms and limitations similar to those imposed on pilots (subsec. 329(e)).

(ii) *Objective duration of licence and certificate.* A Pilotage Authority's control over the duration of a pilot's licence is neither absolute nor discretionary. A Pilotage Authority can not interfere with the tenure of a licensee

except when so authorized by specific provisions of the Act, or by legal regulations. The same applies to pilotage certificates.

The actual duration of such a licence or certificate is affected by two sets of factors:

- (a) objectively, by its maximum duration which is fixed by the Act and the applicable By-law;
- (b) subjectively, by the licensee himself contravening the Act or the regulations or for failing to meet legislative requirements. Such a lapse will either cause automatic, premature termination or will authorize withdrawal by the Pilotage Authority acting in a quasi-judicial capacity.

The Act is silent as to the duration of an apprentice licence or of a pilotage certificate granted to a ship's Master or mate. This omission is in contrast to the detailed regulations covering pilots' licences. In the case of an apprentice no problem really exists because an apprentice licence is, in fact, only a training requirement and the status of an apprentice ceases when the individual concerned reaches the maximum age limit for acceptance as a pilot, or fails to meet apprenticeship requirements, or is suspended or dismissed for misconduct (subsec. 329(f), and secs. 368 and 372).

Similarly pilotage certificates present no real problem. Formerly, they were limited by the Act to one year, but could be renewed from year to year on endorsement by the Pilotage Authority (sec. 469, 1927 C.S.A.). This provision was abrogated in 1934 along with all other statutory provisions dealing with these certificates and the duty of legislating on the whole question was transferred to the Pilotage Authorities with one limitation, that is, a pilotage certificate is valid only for the ship to which the certificate-holder belongs. Therefore, a certificate automatically lapses when its owner ceases to belong to the ship named on the certificate. Otherwise, the wording of subsec. 329(e), which enables a Pilotage Authority to fix by regulation the terms and conditions of a certificate, is wide enough to cover the question of duration. However, a Pilotage Authority is powerless to withdraw a certificate for incompetence or physical or mental unsuitability; the few provisions in these fields apply to pilots only (vide C. 9, pp. 356-370). No doubt, in such a case the shipowner would require the certificate-holder to leave his employment, thus automatically invalidating the pilotage certificate; or if the Master or mate holds a Canadian certificate he could be deprived of it on the initiative of the Minister under Part VIII of the Act. Although a Pilotage Authority has no statutory power to deal with these aspects of the problem, the situation is not serious because, normally, such certificates are of very short duration. The Act foresees that a Pilotage certificate may be forfeited for unreliability provided appropriate regulations are passed by the Pilotage Authority pursuant to subsecs. 329(f) and (g) (vide C. 9).

COMMENT

If, in future legislation, emphasis is to be placed on the issuance of pilotage certificates, both as a safety measure and as a method of granting exemptions, it is believed that the powers of Pilotage Authorities to suspend or withdraw these certificates should be extended so as to enable them to ensure that certificate-holders remain professionally qualified, physically and mentally fit and reliable.

A. *Permanent licences.* The Act provides for two types of licence:

- (a) permanent licence (sec. 338 and subsec. 329(i));
- (b) temporary licence (subsecs. 329(n) and (o)).

Licences are normally permanent and, in the absence of regulations providing for a temporary licence, any licence issued is automatically permanent.

The maximum duration of a permanent licence is determined by the age of the licensee; it is valid until the pilot reaches the statutory retirement age of 65, after which the licence is renewable on a yearly basis provided he is declared physically and mentally fit to continue piloting (sec. 338), and until he reaches the absolute retirement age of 70. However, the Pilotage Authority may by by-law make one change, i.e., provide for the compulsory retirement of a pilot at age 65 (subsec. 329(i)).

It is bad practice to repeat the statutory provisions of the Act in a By-law, e.g., subsec. 26(1) of the Bathurst Pilotage District General By-law which is a repetition of sec. 338 except that what appears to be a further requirement is added, namely, a pilot's eyesight and hearing must be satisfactory. This requirement is implicitly contained in sec. 338 which states a pilot must be "declared capable of performing his duties as a pilot by a medical officer appointed by the Pilotage Authority". In any event this is a matter for the courts to decide. A Pilotage Authority should not give its interpretation of a permanent statutory provision in a By-law unless it is empowered to do so, which is not the case here. Subsec. 329(i) only authorizes Pilotage Authorities to make regulations to

"provide for the compulsory retirement of any licensed pilot who has attained the age of sixty-five years, subject to the provisions of this Part for the granting of a new licence".

Therefore, a Pilotage Authority has no power to vary the conditions imposed in sec. 338 for the reissuance of licences. If it is deemed that the terms of sec. 338 are not clear enough, it is the duty of the Pilotage Authority to recommend to the Government that the Act be amended. This principle was expressed in the Supreme Court judgment of *McGillivray v Kimber et al.* previously quoted on a similar point. In 1915, the Canada Shipping Act then in force authorized the Pilotage Authority to limit the duration of a

licence, but to not less than two years (sec. 454, 1906 C.S.A.). The licences issued by the Sydney Pilotage Authority bore a notation to the effect that they were valid for a period of one year only. Mr. Justice Duff stated:

“Section 454 authorizes Pilotage Authorities to limit the period for which any licence can be in force to a period not less than two years. But our attention has not yet been called to any authority for limiting the period to one year. I am inclined to think that the words inserted in the licence granted to the appellant professing to provide that the licence shall be only in force for one year must be treated as inoperative”.

At present, none of the Pilotage Authorities have acted on the power given in subsec. 329(i) by providing by regulation that the ultimate age limit in their District is 65. One of the reasons may be that when there is a pilot fund, neither the pilots nor the Pilotage Authority has any interest in advancing the age limit because this increases the liabilities of the fund.

B. Term licences. In the present C.S.A. there are two types of term licence:

- (a) the statutory annual licence defined in sec. 338, i.e., issued to pilots between the age of 65 and 70 to replace a permanent licence. Its existence is not, and need not be, reflected in the By-laws for it automatically exists unless the contrary is stipulated in the By-laws (subsec. 329(i)). As said earlier, none of the present By-laws contain such a restriction;
- (b) the regular limited licence issued for the term fixed by the regulations, and capable of renewal (subsecs. 329 (n), (o)).

For the sake of clarity and to avoid confusion, different terms should be used to refer to each of these two temporary licences. The second group could be referred to as “term licences”; as to the first group, if the provisions of sec. 338 are to be retained, they should be modified to provide, not for the issuance of new licences for pilots over 65, but for annual extension or prolongation of permanent licences by endorsement, until the final age limit is reached (always subject to the pilot’s suitability). “Drafting should be consistent. If the same meaning is intended, the same words should be used and if different things are intended different words should be used” (Driedger *op. cit. supra*, p. 125).

Subsecs. 329(n) and (o) of the Act read as follows:

“329 . . . Every Pilotage Authority shall . . . have power . . . by by-law confirmed by the Governor in Council, to

- (n) limit the period during which any licence to a pilot shall be in force,
- (o) renew for a further limited term any licence issued for a limited period pursuant to paragraph (n).”

Except for the provisions for fixing the age limit in permanent licences, these are the only other provisions in the Act which authorize any interference on the part of the Pilotage Authority with the objective duration of a pilot's licence. This power is subject to two conditions:

- (a) a term must be fixed;
- (b) the term must be fixed by regulation.

These two conditions appear unambiguous. It is through the exercise of legislative powers that such decisions must be taken and, therefore, the duration of a term licence must be fixed either directly or indirectly in a By-law so that no discretion remains. Since a licence is a right, its extent must always be objectively ascertainable.

Until the last amendment to subsecs. 329(n) and (o), there was no possible ambiguity because the duration of a licence on first issue and any renewals were to be not less than two years and the period of validity had to be fixed in the regulations at or above this minimum. In 1956, the only amendment was to delete this minimum, thus authorizing a shorter term.

When subsec. 329(o) is read in conjunction with subsec. 329(n) the meaning is even clearer. Since subsec. (o) authorizes renewal for a further limited term, if the term fixed for a first licence has expired, this subsection would be meaning'ess if a licence could be issued for an indeterminate period, and could be cancelled at any time at the discretion of a Pilotage Authority. Under these circumstances there would be no reason for renewing a licence after deciding to cancel it.

Subsec. (o) was necessary to enable a Pilotage Authority to renew a term licence without being obliged to repeat the whole licensing process. It is a reasonable and realistic provision: the qualifications of any pilot issued a term licence have been fully appraised during his service and the Pilotage Authority is satisfied that a pilot is still qualified, fit and reliable and if there is a vacancy, it is only reasonable and logical that he should be reinstated on the basis of his experience. It is doubtful, however, whether under these circumstances a pilot has acquired the right to renewal or whether this is left to the entire discretion of the Pilotage Authority, which could discriminate against him for any reason whatsoever even, as has happened, on political grounds. If the number of pilots is not limited by regulation, there is no problem and the Pilotage Authority must renew licences either automatically or, if there is no By-law provision authorizing renewals, by requiring former pilots to pass an examination for a new licence. But if there is a fixed number of pilots there is nothing in the present Act which establishes any precedence for those who meet the required standards. It is believed that in order to attract the best qualified persons and to benefit from acquired experience, a right of precedence should be guaranteed to those whose licence comes up for renewal. In addition, each Pilotage Authority should be authorized to fix the terms and conditions of such renewal in its regulations.

The retirement age limit applies also to term licences in that it affects the capacity of a person to become or to remain a licensee. Therefore, even if term licences are issued, a Pilotage Authority may by by-law fix compulsory retirement age at 65.

In practice there are three types of term licence: (a) the only type of licence available in a District; (b) an accessory which is a prerequisite to obtaining a permanent licence; (c) a licence to meet temporary emergency situations.

In Churchill, there is only a term licence valid for the duration of the navigation season. This is necessary because for special reasons pilotage can not be self-supporting and the performance of pilotage duties is now complementary to employment as Port Warden and Assistant Port Warden, to ensure adequate remuneration.

The Prince Edward Island By-law (sec. 11) provides for limited licences; their duration is not fixed in the regulations but is left to be fixed by the licensing authority. As seen earlier, the provision is inoperative since it is illegal and all licences so issued are, in fact, permanent. No doubt this question was left to the discretion of the licensing authority in an attempt to overcome the difficulties created by the peculiar type of organization in this District where a different set of by-laws was needed in each port to resolve local problems.

In all other Districts, except Quebec and Montreal, a term licence called a probationary licence is a prerequisite to obtaining a permanent licence. It might be defined as a first licence issued to a successful candidate to allow the licensing authority to appraise his skill before a permanent licence is issued. The period (one year) is fixed in the By-law of only six Districts: B.C., Cornwall, Halifax, Montreal [for harbour pilots], New Westminster and Saint John. In the other Districts, the duration is not stated in the regulations but is left to be fixed by the licensing authority. At the expiration of the term so fixed, upon receipt of a favourable report from the Secretary or the local representative, the Pilotage Authority may, at its discretion, issue a permanent licence. Here again, because the term is not fixed in the regulations, the provision is inoperative and a licence is permanent when issued.

A probationary licence meets a real service need, whether or not there is an apprenticeship system. Until a Pilotage Authority has seen a candidate in operation over a long period of time his qualifications can not be fairly judged. The probationary period, which is, in fact, the final phase of training, affords this opportunity. The apprenticeship system in Quebec and Montreal is lacking in one respect, namely, if it becomes apparent that a Grade C1 or C2 pilot does not possess the necessary skill, the Pilotage Authority is powerless to deprive him of his licence and has to depend upon the decision of the administrative courts the Minister may create at his discretion under Part VIII. If the Minister does not convene such a court, all the Pilotage

Authority can do is not promote the pilot concerned to a higher grade. This is a very unsatisfactory situation. Furthermore, at present, in the absence of criteria defined in the regulations to determine what is considered a satisfactory performance, it is believed, despite the apparent discretionary power given by the Act, that a Pilotage Authority has no other option than to issue a permanent licence because otherwise it would be guilty of discrimination. In fact, it has been the practice to replace probationary licences automatically at expiration by permanent licences and no probationary pilot in recent years has been denied a permanent licence, or had such a licence postponed for lack of skill. Licences have been held back or delayed only when pilots were involved in shipping casualties. Since the probationary period is, in fact, one part of apprenticeship which is a prerequisite for licensing, its terms and conditions ought to be stipulated in the By-laws. The legality of a probationary licence is questionable but, on the other hand, it answers a definite licensing need. The Act should be amended to make probationary licences permissible and to define the rôle and powers of Pilotage Authorities as licensing authorities over probationary licences.

The third type of term licence was formerly provided for in several By-laws, but at present, occurs only in the Districts of Quebec (sec. 35) and Montreal (for river pilots) (sec. 34). It is called a temporary licence. It is an emergency measure to overcome a temporary shortage of pilots and its term is the duration of the shortage. Such a provision is legal, provided the regulations state how to determine whether a shortage of pilots exists and do not leave the matter to be decided arbitrarily. This point raises a number of questions that must be considered if consistent regulations are to be enacted.

If the number of pilots is not fixed, there is no problem, except for standards of qualifications, because the exercise of the profession is open to anyone. If a shortage is due to lack of candidates who are qualified as per regulations, the matter should be dealt with as indicated below.

If the number of pilots is fixed in the regulations, and there is no vacancy, a Pilotage Authority is powerless to issue emergency licences because the fixed number is the limit of its licensing powers. But, as stated earlier, the regulations which fix the number of pilots should provide for a number of temporary licences to cover temporary fluctuations. If there are vacancies, the usual causes are lack of candidates or absenteeism. To make up for a shortage of candidates who have completed their apprenticeship, the regulations governing prerequisites for licensing should contain provisions to authorize licences for candidates who have less training or who are not recruited as apprentices. The regulations should also state the qualifications required of emergency pilots and the limitations as to grade should form part of such licences. A Pilotage Authority should never be authorized by legislation to issue a licence to a candidate who does not reach the prescribed standard.

If a serious shortage is due to any combination of sickness, special official leave or suspension, or any one of them, of a temporary nature, the District By-law should provide the Pilotage Authority with power to issue temporary licences to apprentices that are qualified for licensing as pilots, such temporary licences to lapse automatically when the regular pilot or pilots return to duty.

(iii) *Subjective and implied terms and conditions of licences and pilotage certificates.* The possession of a licence or of a pilotage certificate indicates that the holder meets the licensing requirements and also implies that his qualifications are maintained because maintaining his qualifications and observing his duties and responsibilities as a licence or certificate-holder are subjective and implied conditions.

A distinction should be made here between the terms and conditions applicable to a given licence which can not be modified, except by an Act of Parliament or with the consent of the licensee once the licence is issued, and the means of ascertaining whether the terms and conditions, expressed or implied, are respected. These means may be modified and improved to meet new situations or to make surveillance more efficient but they do not affect the required standard of qualifications, e.g., a pilot can not be more or less physically fit, more or less reliable, he must be fit and reliable in the full meaning of the phrase.

While Parliament refrained from legislating with respect to licensing requirements and gave blanket authority to fix requirements by regulation, it acted much more cautiously with regard to the obligations and duties of licensees. It legislated on some aspects and delegated legislative powers to Pilotage Authorities on specific and limited questions only.

Licences and certificates, once granted, are considered acquired rights, the tenure of which is guaranteed by law.

The limited powers granted to Pilotage Authorities over pilot licences and pilotage certificates, once issued, the question of disciplinary powers over pilots and pilotage certificate-holders together with the interpretation of subsec. 329(g) are studied in chapter 9, to which reference is made.

Subsec. 329(f) has been given a wide interpretation and taken as authority for the Pilotage Authority to take over control of pilotage from the individual pilots, to manage the service and to make pilotage contracts. The problem is whether subsec. (f) merely confers on a Pilotage Authority the power to legislate for the conduct of licensees, and nothing else, or whether, through its regulations, a Pilotage Authority can give itself all these executive powers.

Before studying the terms of this subsection, it is pertinent to review the situation briefly. Subsec. 329(f), like the other subsections of sec. 329, defines one of the subject-matters of the regulation-making power of the Pilotage Authority, i.e., under this power the Pilotage Authority is merely

acting in lieu of Parliament to pass legislation applicable to its District. This legislative power is delegated and, therefore, is limited by the terms of the delegation contained in the subsection itself, the interpretation of which must be consistent with the context of the Act.

Leaving aside the question of fixing the number of apprentices, which has already been dealt with, and the question of the procedure for holding enquiries, both of which were wrongly located in this subsection through faulty drafting, the subject-matters of the regulations authorized by subsec. (f) are the following:

- (a) "for the government of pilots, and of masters and mates holding certificates . . . , and . . . of apprentices";
- (b) "for ensuring their (not apprentices) good conduct on board ship and ashore";
- (c) "for ensuring constant attendance to and effectual performance of their (not apprentices) duty on board and on shore".

As for pilots and, *mutatis mutandis*, ship's officers holding pilotage certificates, the limit of a Pilotage Authority's power is to make the rules that govern the exercise of the pilotage profession by self-employed, independent contractors (which licensed pilots are supposed to be under Part VI) exactly like the licensing authorities of such professions as law, medicine and pharmacy. No licensing authority as such is empowered to become involved in the exercise of a profession.

"For ensuring their good conduct on board ship and ashore" is clear enough since it refers only to the behaviour expected of pilots or ship's officers holding a pilotage certificate, i.e., conduct becoming a Crown licensee. "For ensuring their . . . constant attendance to their duty on board and on shore", should not be ambiguous either for a pilot's licence is equivalent to a franchise in that only those who are licensed are entitled to exercise the profession. On the other hand, such a privilege carries responsibilities, one of which is to be constantly available when off duty and rested so that the purpose of licensing can be achieved, i.e., ships have a number of qualified pilots to choose from. Again, "For ensuring their . . . effectual performance of their duty on board and on shore", requires little explanation. Since a pilot's duty is to navigate a ship at a Master's request anywhere in the District, the effectual performance of these duties is the consideration of the contract of hiring. Normally, the non-performance or the incomplete or inefficient performance of such a duty would amount to a breach of contract rendering the pilot answerable in damages, but since the pilot is a licensee, the effect is a breach of his obligations as a licensee, a breach of trust that affects his reliability. Any pilot who, without cause, stops piloting en route, or does not obey a Master's orders when the safety of the ship is not involved, is unreliable.

It is the other provision “for the government of pilots, and of masters and mates . . . , and . . . of apprentices” that is more likely to be misconstrued. In fact, it is now taken as meaning that the Pilotage Authority, as executive authority, has the power to give orders to the pilots. This is a misinterpretation which is incompatible with the text of the subsection and the context of the Act, and which, when acted upon, imposes upon the Crown a wide responsibility that the legislature neither envisaged nor authorized. The term “government” here means “the manner in which one’s action is governed”. (*Shorter Oxford English Dictionary*). This view is supported by the French version of the C.S.A. which uses the term “gouverne” and not “gouvernement”, which means “*règle de conduite personnelle*”. It is also apparent from the text itself when not truncated that the term “government” applies in the same manner to Masters and mates, and must be equally applicable to pilots. But when the phrase “for the government of pilots” is taken out of both text and context it is easier to make a mistake. The meaning of the expression as used in the Act is now obsolete in English. It should be remembered that the words, the style and almost all the provisions of Part VI date back to the U.K. Merchant Shipping Act of 1854, and possibly even much earlier. Therefore, the words and terms should be given the meaning they had at that time. The fact that the meaning of some words may have become obsolete since, does not alter the substance of the law and if, on that account, the text has become ambiguous or difficult to understand, only Parliament can bring the Act up to date by redrafting.

Furthermore a rule of interpretation is that an enumeration defines and limits the general statements that accompany the enumeration. In subsec. 329(f), general provisions are followed by a list of points that may be covered in regulations for the “government of pilots”. It is realized that this list is not limitative, otherwise the preceding general statements would not have been necessary, but the list gives examples of the type of regulations intended.

It is noted that none of the situations listed contains any reference to a power that could be delegated by by-law to a Pilotage Authority as executive authority. The only authorization is to pass regulations that are complete in themselves and contain all the elements required to determine whether or not there has been a breach of regulations, i.e., it is “to make regulations for the government of pilots” to provide that they must not lend their licence (item i), that they must be sober when about to proceed on duty or when on duty (item iii), that they must not proceed beyond the limits of the Pilotage District without the consent of the Authority (item iv), that they can not refuse to perform pilotage except on lawful and valid grounds (item v); to provide punishment for malingering with the intent of being unavailable, for behaving in a manner unbecoming a pilot, for repudiating contractual obligations by refusing to pilot a ship to a destination within district limits as

desired by the Master or by quitting a ship before she has reached her destination within the District. But there is no power to make regulations for constant attendance with a view to preventing pilots from accepting pilotage except upon assignment by the Authority. All a Pilotage Authority is empowered to do under subsec. 329(f) is to create by regulation a code of service discipline compatible with the type of organization and the status of pilots provided for in Part VI C.S.A.

The only point that may be open to contention is contained in 329(f) (iv): "is guilty of insubordination". This presupposes a lien of subordination, the right to give orders to a pilot. It can not be inferred, however, that these orders necessarily come from a Pilotage Authority or that these words alone give a Pilotage Authority power to give orders to a pilot about the exercise of his profession. It must be remembered, as stated by the Supreme Court in the McGillivray case quoted earlier, that the relationship of master and servant does not exist between a Pilotage Authority and a pilot and that each pilot is entitled to exercise his profession free from interference on the part of the Pilotage Authority, as long as he complies with the obligations imposed upon him by the Act and by valid regulations. Therefore, a Pilotage Authority has no discretionary power to give orders to a pilot. Any power that may be used must be founded on a specific statutory provision; e.g., if a Pilotage Authority in the exercise of the power related to its licensing power orders a pilot to submit to a medical examination under regulations passed under subsec. 329(j); or orders a pilot to appear before it or before any other person in the course of an inquiry authorized by regulations adopted under subsec. 329(f), or at a hearing to settle a dispute pursuant to regulations passed under subsec. 329(k). A pilot might also be considered guilty of insubordination if he refuses to abide by a Master's orders in cases which do not affect the safety of the ship such as the route to be taken when there are alternative routes, time of departure or speed, or, if he is available, refuses to undertake pilotage after being requested by a Master or by a representative of a Pilotage Authority.

However, punishment for most of these cases of insubordination could nevertheless be imposed as a breach of regulations passed under other subsections or of regulations passed under the general provisions of subsec. 329(f). The use of the term "insubordination" is liable to create confusion, and, if this item is to be retained in future legislation, it ought to be qualified so as to conform with the context. Its relative inconsistency may be explained by the fact that the term was included in the Act as a result of the 1936 amendments (1 Ed. VIII c. 23) which were mainly aimed at increasing the disciplinary powers of the Pilotage Authority (this is studied in chapter 9). It would appear that the amendments were drafted under the false assumption that the Pilotage Authority had full control over pilots and the exercise of their calling.

The interpretation that a Pilotage Authority may exercise managerial power over pilotage is also incompatible with the context of the Act, which, as demonstrated earlier, provides for a scheme of free enterprise pilotage, even in compulsory payment Districts. It is a rule of interpretation that a statute must be read as a whole. The exercise of full control over providing pilotage service makes the Pilotage Authority, for all practical purposes, the contractor and the pilots its servants. The difficulty is compounded when the Pilotage Authority also imposes its choice of pilot on a ship for, by making a choice, the Authority assumes a responsibility that properly belongs to the ship and, therefore, gives an implied guarantee that the pilot is fit and reliable at the time of the assignment. Such a responsibility is in no way contemplated in the Act. A Pilotage Authority is an agent of the Crown. The terms and the extent of its mandate are found in legislation and must be strictly interpreted. When an Act imposes a duty on a Crown agent, and defines his powers, it is implied that Parliament has taken into consideration the fact that the Crown is answerable for any damages caused to third parties by the agent while acting within the limits of his mandate and in the performance of his duty.

Therefore, the following provisions contained in Pilotage District By-laws are illegal:

- (a) Those to the effect that the Secretary or the Superintendent, as the case may be, is given the direction of pilots and that he may make orders which the pilot must obey. Sec. 3 of the British Columbia By-law is clearly illegal in the present context of the Act. It reads as follows:

“3. (1) The Superintendent shall have the direction of the pilots and may make orders for the effective carrying out of this By-law and for the administration and management of the District and, without limiting the generality of the foregoing, may make orders with respect to

- (a) the conduct of pilots;

...”.

The pilots are not under direction and any rules regarding their conduct must be enunciated in regulations and not left to the discretionary power of any one, much less a representative of the Authority.

- (b) All provisions whereby the pilots are not permitted to undertake pilotage except as assigned by the Secretary or by the Superintendent as the case may be, e.g., subsec. 23(1) of the B.C. District By-law, which reads as follows:

“23. (1) Pilots shall undertake pilotage duty when and where required by the Superintendent and shall not pilot any vessel except as directed by the Superintendent”.

- (c) All By-laws that provide that a probationary licence can be withdrawn at any time by the Pilotage Authority upon receipt of an

unfavourable report. The Pilotage Authority has never had any discretionary power over a pilot's licence. The Supreme Court decisions re *McGillivray v Kimber et al.* apply here as in other cases and the fact that a licence is called probationary does not change the situation. A Pilotage Authority must derive its right to withdraw a licence from specific provisions in the Act or from *intra vires* regulations. The ground for withdrawal upon an "unfavourable report" is not contained in any such provision.

(iv) *Remuneration for pilotage services.* The price payable by a ship for any pilotage service rendered is fixed by regulation under subsec. 329(h) C.S.A. The scope of subsec. (h) and the distinction between "pilotage dues" and "pilot's remuneration" or "pilot's earnings" and "pilot vessel earnings" were dealt with in chapters 5 and 6.

2. REGULATIONS CONCERNING PILOT VESSELS. The only statutory provisions contained in the Act regarding pilot vessels are subsec. 2(65) the statutory definition, secs 365, 366 and 367 re pilot vessels displaying a signal; sec. 364 making it an imperative obligation on the part of each Pilotage Authority to approve and license all pilot vessels regularly employed as such in each District and, finally, subsecs. 329(b) and (c) delegating to each Pilotage Authority the duty and responsibility of passing any further legislation needed to discharge its licensing responsibility for the requirements and peculiarities of its District. In the By-laws and in official publications pilot vessels are generally referred to as "pilot boats". (For distinction between "vessel", "ship" and "boat" vide C. 7, p. 213 & ff.).

Formerly, the Act contained additional sections (secs. 475 to 481, 1927 C.S.A.) regarding the markings which decked and open pilot vessels were to carry for ready identification, i.e., the name of the vessel, the owner and the home port. This regulation had its importance in the days of free competition when a number of pilot boats had to be available to enable all the pilots in a boarding area to vie for clients, but this situation no longer exists under a system where pilots are despatched, as required, by *tour de rôle*. In most boarding areas, pilot vessel service is now provided by a single operator. It was no doubt because these sections had lost their usefulness that they were deleted when the new Canada Shipping Act was approved in 1934.

Pilot vessel requirements vary from District to District according to local conditions and the type of pilot vessel service required, e.g., there is no comparison between a pilot vessel that would be considered safe and adequate for use on the St. Lawrence River in sheltered waters off Quebec, and one to be used in the seaward approaches to Saint John, N.B. or Triple Island, B.C. Small craft suffice where distances are short and few passengers are carried at any one time, but larger pilot vessels are essential for long trips in open waters, particularly where traffic is heavy and a number of pilots

must be carried for many hours, e.g., during the years when the Quebec seaward station was at Father Point and, in modern times, *inter alia*, at Sand Heads in the New Westminster District and at Halifax.

The Act authorizes two types of regulation regarding pilot vessels: licensing (subsec. 329(b)), and “companies for the support of pilot vessels” (subsec. 329(c)).

(a) *Regulations relating to licensing.* Subsec. 329(b) gives a Pilotage Authority power to make all necessary regulations related to licensing pilot vessels in the context of a free enterprise system, but it is not adaptable to the type of controlled pilotage that has developed. Subsec. 329(b) authorizes a Pilotage Authority to make regulations covering:

- (A) requirements for approval;
- (B) method of licensing;
- (C) terms and conditions of a licence;
- (D) remuneration.

(i) *Mandatory duty to make licensing regulations.* Licensing pilot vessels is a duty imposed by Parliament on a Crown agent, the Pilotage Authority. The obvious reasons for the licensing requirement are to ensure (a) the safety of the pilots and (b) the availability of suitable pilot vessels. This licensing power is not discretionary but is a quasi-judicial function whose exercise is governed by precise, adequate rules and requirements that must be contained in legislation. Since the licensing of pilot vessels is mandatory (sec. 364) and there is no requirement or rule in the statutory provisions of the Act concerning the discharge of this duty, it becomes mandatory for each Pilotage Authority to enact the necessary regulations, i.e., it has no discretion whether to legislate or not to legislate. As will be discussed later, the need for the Crown’s control in this field is not as great today as it was formerly but the change has not as yet been reflected in the Act whose imperative provision remains unaltered. Whether it should be altered or abrogated will be considered later when licensing power is studied (vide p. 312).

A Pilotage Authority can not decide not to legislate on the matter nor can it satisfy itself with superficial, inadequate regulations because, as licensing authority, it is obliged to approve and license any vessels that meet the requirements as laid down in the regulations. Once regulations are made and approved by the Governor in Council, they become the law of the land which is binding on the Pilotage Authority as licensing authority just as on any other person. Therefore, if these regulations are found to be deficient, it is the duty and responsibility of the Pilotage Authority to have an appropriate amendment drawn up in accordance with the prescribed procedure. Until

such an amendment is legally approved, the Pilotage Authority is powerless to add any District criterion or requirement not already contained in the District By-law.

(ii) *Requirement for approval of pilot vessels.* The first criteria to establish in the regulations are type of vessel and type of equipment considered essential for safety and efficiency in the area. The By-law must ensure that pilot vessels are seaworthy and of suitable construction to carry out the hazardous manoeuvre of going alongside vessels to embark or disembark pilots in all the conditions of sea and weather that may prevail in the area where the service is to be performed. It must ensure that accommodation is suitable for the number of persons the pilot vessel is expected to carry during normal tours of duty, and must define the life-saving equipment and other devices and instruments to be carried, such as radiotelephone, radar and echo sounder.

(iii) *Licensing procedure.* As for licensing, the regulations should lay down a complete procedure, i.e., application form, supporting documents, verification and examination procedure, licence format, and forfeiture.

(iv) *Terms and conditions of licence.* In order to hold a licence, it is not sufficient for a pilot vessel to be seaworthy and suitable for service at the time the licence is issued: the required standard must be maintained and the vessel must be manned by competent personnel. Therefore, these additional factors ought to be dealt with in the regulations as terms and conditions of the licence. The scope of these terms and conditions is determined in subsec. 329(b) as follows: "make regulations respecting the . . . management and maintenance of pilot vessels and their equipment, . . . and respecting the distribution of the earnings of pilots and pilot vessels;". There is no authority to fix either the duration or number of licences, or to charge a licence fee.

Since there is nothing in the Act to authorize issuing term licences, all licences must be permanent or, at least, unlimited and their duration is affected only by failure to observe a regulation.

There is no authority to impose a fee for issuing a licence; such a debt to the Crown must be authorized by statute. As seen earlier, such authorization exists to set fees for pilot licences and pilotage certificates and for their renewal. Hence, the absence of such authorization for pilot vessel licences can only mean that no fee can be charged. It should be borne in mind that in the original concept of the scheme pilot vessels were owned and operated by the pilots themselves. Here again, it is not clear what useful purpose could be gained by imposing such a fee which, in any event, has always been nominal.

A Pilotage Authority is not authorized to regulate by by-law the number of pilot vessel licences it will issue. Because licensing is in itself an infringement on the freedom of the exercise of a right (in this case the right of the owners of vessels to transport pilots is limited to those vessels which meet the licensing requirements), it is a further infringement when the duty to license

is limited to a given number of licensees. When such a restriction was intended, a specific statutory provision had to be included, i.e., subsecs. 329(e) re pilots and 329(f) re apprentices. Since no similar statutory provision exists regarding the licensing of pilot vessels, the Pilotage Authority is bound to license any vessel which meets the requirements of the regulation, regardless of the actual requirements of the service and the number of licences issued at the time. Any regulation which limits the number of licensees would be *ultra vires*. This is in accordance with the situation contemplated by the Act, i.e., licences are issued to independent contractors engaged in a competitive business. It is also for this reason that the Pilotage Authority is powerless, through its regulations or otherwise, to compel pilots to use the services of any pilot vessel so licensed; it is the right of the pilot vessels to compete among themselves for the pilots as customers.

As seen earlier, this is not the situation now because the exercise of the pilot's profession is no longer on a competitive basis anywhere in Canada. If future legislation legalizes a fully controlled pilotage service, an unlimited number of pilot vessel operators would impede efficiency. Pilotage Authorities should be empowered to pass regulations limiting the number of operators to those requisite to meet local requirements, unless a Pilotage Authority is itself authorized to operate a pilot vessel service and does so.

The only terms and conditions that may be imposed by regulation are those falling within the categories enumerated in subsec. 329(b), i.e., the management and maintenance of pilot vessels including their equipment, and the distribution of their earnings.

The meaning of "maintenance of pilot vessels and their equipment" is clear, i.e., the standards required when the vessels were licensed must be maintained, but at first reading, "*management*" may be as misleading as "government" in subsec. 329(f). In its nautical sense manage means to handle or work a ship or boat (Shorter Oxford English Dictionary), and management of a vessel means all that is related to the obligation "to take reasonable care of the ship or some part of the ship, as distinct from the cargo" (Scrutton, *Charterparties*, pp. 243-245). Since the management of a vessel is to be regulated, and not the service the vessel is called upon to perform, this term can not be construed as authorizing a Pilotage Authority either to own a pilot vessel or to operate a pilot vessel service.

Furthermore, this interpretation would leave the regulations deficient because, in addition to seaworthiness, adequate maintenance and proper equipment, it is equally important for a vessel to be suitably manned and safely navigated. *Inter alia*, the Master must be competent, fit and reliable, attributes which are adequately covered by the first interpretation.

One consequence of the disappearance of free competition in the exercise of pilotage was the tendency for Pilotage Authorities to operate the pilot vessel service in their own Districts, e.g., New Westminster and Halifax. This unauthorized venture had serious legal repercussions which resulted in litigation.

At present, pilot vessel service is provided by the Government or by independent contractors in all large Pilotage Districts; a few small Districts under a local Pilotage Commission operate their own pilot vessels; in some Districts the service is still provided by the pilots individually.

To interpret the term "management of pilot vessels" as meaning the exercise of a pilot vessel service is inconsistent with the text of the section and with the context of the Act. The text provides a legislative and not an administrative power and the operation of pilot vessels by Pilotage Authorities implies vast additional responsibilities on the part of the Crown which Parliament neither authorized nor contemplated. Such an interpretation would be inconsistent with sec. 364, in that it would deprive Pilotage Authorities of their disinterested, unbiased position and thus theoretically disqualify them for their mandatory duty of approving and licensing pilot vessels.

A somewhat similar power existed legally only in the Quebec District when the Pilots' Corporation was created in 1860 and the free exercise of pilotage was abolished. Specific legislative provisions were required to give the Pilots' Corporation (not the Pilotage Authority) power to control both pilots and pilot vessels. When these powers were vested in the Minister in 1914, specific provisions to that effect were also required. The gist of these is essentially different to subsec. 329(b) because the term "control" was used. Sec. 1 of the 1914 Act (4-5 Geo. V c. 48) reads as follows:

"1. The Minister of Marine and Fisheries subject to the provisions of the Canada Shipping Act, shall have charge of the examination, licensing, control and management of the pilots and pilot apprentices, and the control and management of pilot schooners, boats and other vessels for the pilotage district of Quebec . . .".

The acceptance of *remuneration* for services as fixed in the regulations is an implied condition of a licence. Regulations to this effect are necessary only where regular pilot vessel service is furnished by third parties. As seen earlier, it is part of the contractual responsibility of a pilot to provide for his own transportation to and from a vessel he has undertaken to pilot. If local conditions are such that it becomes impracticable for pilots to furnish their own transportation, the Pilotage Authority states in its licensing regulations the amounts the operators of pilot vessels belonging to third parties are entitled to receive from pilots out of the dues earned for pilotage services rendered.

The distinction between "pilot earnings", "pilot vessel earnings" and "pilot boat charges" was studied in chapter 6, as was the recommended way they should fit in the regulations, either with or without the compulsory payment system (vide C. 6, pp. 182-184).

(v) *By-laws and factual situation.* However, existing By-laws do not correspond to the factual situation. The By-laws of the larger Districts

contain no provisions regarding approval, licensing, management and maintenance of pilot vessels and their equipment; the regulations concern remuneration for pilot vessel service and pilot boat charges only.

The main consequences of this omission are, first, Pilotage Authorities are powerless to comply with sec. 364, i.e., to discharge their imperative duty of licensing pilot vessels; secondly, the regulations which now purport to fix charges for pilot boat service are not binding.

At first sight, it would appear that in the absence of regulations governing prerequisites and conditions for licensing, all applications for a pilot vessel licence should automatically be granted as long as the object applied for can be identified as a vessel, whether or not it is seaworthy and suitable. However, this is not so. The absence of regulations or their inadequacy, which amounts to absence, makes licensing impossible. The mandate of a Pilotage Authority as licensing agent is to prevent vessels which do not meet required standards from being used as pilot vessels. In the absence of regulations, there are no standards to meet and no quasi-judicial decisions to render. The result is, in reality, a denial of the Pilotage Authorities' licensing power and any licence issued in such circumstances is null and void.

Just as with pilotage contracts, the power of a Pilotage Authority to intervene in the terms of contracts for pilot vessel service is a consequence of, and an accessory to, the power to issue licences. Acceptance by the licensee of the price fixed for his services by regulations from time to time is a condition of the licence. Therefore, when pilot vessel service is provided by non-licensees, charges remain a matter to be agreed upon by the pilots and the pilot vessel owners. A Pilotage Authority has no control over such a contract and has no power to enforce its regulations on an unlicensed owner.

After analyzing the regulation-making powers of Pilotage Authorities over the licensing of pilot vessels, it is pertinent to review the use that has been made of them. Pilotage Districts can be divided into the following categories:

- (a) there is no need for regular pilot vessel service;
- (b) pilot vessels are regularly employed but there is no regulation or charge in the tariff relating to pilot vessels;
- (c) there are regulations and a covering item in the tariff;
- (d) the regulation is limited to fixing pilot vessel earnings and there is a covering item in the tariff;
- (e) there is no regulation but there is a covering item in the tariff.

Cornwall is the only District where there is no requirement for pilot vessel service. The pilots embark and disembark at both ends of the District, either in St. Lambert Lock or Snell Lock or at the approach walls. Since a pilot would have to embark or disembark en route only in unforeseen circumstances which can not be covered in the By-law, sec. 364 and subsec. 329(b) do not apply in the Cornwall District.

In the Newfoundland Districts of Botwood and Port aux Basques and in the Districts of Montreal and Quebec (in part), regular pilot vessel services exist, but their By-laws contain no regulation relating to pilot vessels. In the Newfoundland District of Humber Arm, the situation is the same except that a pilot boat charge is provided in the tariff. In these three Newfoundland Districts, the reason for the absence of licensing regulations is that the pilot vessels are owned and operated by their respective Pilotage Authorities and, according to the By-laws, the pilots are on salary. The Humber Arm By-law contains pilot boat charges in order to provide a higher charge when a tug must be used as a pilot vessel because of thick ice in the harbour.

Sec. 8 of the Botwood By-law segregates part of the pilotage dues for the operating expenses of the District and of the service, *inter alia*, for "the cost of acquisition, maintenance and operation of pilot boats".

Subsec. 8(3) of the Port aux Basques By-law provides:

"Where, at the end of a financial year there is a surplus of funds in the Pilotage Fund over and above a safe operating capital after all salaries, remuneration and operating expenses including insurance and depreciation, replacement or renewal of the pilot boat have been settled, the surplus may, in the discretion of the Authority, be divided among the pilots and the boatmen."

While the Humber Arm By-law is not as explicit, it is to the same effect.

In a judgment rendered June 28, 1956, by the Supreme Court of Newfoundland (Dunfield J.) in the case of Nathan Dyke and the Pilotage Commissioners for Humber Arm, the organization of the Humber Arm District was found to be *ultra vires* under both the Canada Shipping Act and the pre-Confederation statutes concerning pilotage in Newfoundland, i.e., chapter 215 of the Revised Statutes of Newfoundland, 1952, entitled "Of Outport Pilots and Pilotage". Both Acts were considered by the Court as being practically nothing more than licensing Acts (S.C. Newfoundland, file 1955, No. 63). The ownership of pilot vessels and the provision of pilot vessel service by the Pilotage Authority were found *ultra vires* and extra-statutory.

In the District of Montreal there is regular pilot vessel service at Three Rivers and Longue Pointe and in the Quebec District at Les Escoumains and in Quebec Harbour. However, only the service at Les Escoumains is partly covered in the By-law. The other services are provided by independent contractors but they are completely ignored by the Pilotage Authorities of these Districts concerned as if they did not exist, or were not needed by the pilots to perform their duties. The legal consequences are:

- (a) The actual cost of transportation in these pilot vessels should be borne by the individual pilot as part of his contractual expenses. No additional charge can be made against a vessel as part of pilotage dues, because there is no segregated item in the tariff to

cover it. Therefore, in the absence of a pilot boat charge in the tariff, it must be concluded that these operating expenses were taken into account when the rates were established and, hence, that they were included in the basic charge. A pilot can not refuse to undertake pilotage if a ship declines to assume these costs, because this would amount to demanding a higher remuneration, which is a statutory offence under sec. 372 C.S.A. and the pilot would then jeopardize his right to hold his licence for refusing to make himself available. However, this situation, which results from the failure of the Pilotage Authorities to discharge their licensing duties, is condoned by them.

- (b) Unless a pilot is prepared to pay the cost of his transportation, a vessel which refuses to hire and pay the pilot vessel would be automatically exempted from compulsory payment (assuming it is in force) if, by such refusal, the Pilotage Authority is unable to provide a pilot.

However, to date, there has been no difficulty because the shipping interests have undertaken to provide these pilot vessel services under private arrangements concluded by the Shipping Federation of Canada with the contractors concerned, and to place pilot vessels at the disposal of the pilots, free of charge. These arrangements are outside pilotage legislation and have binding effect on the contracting parties only. While the costs are assumed voluntarily by ships, they nevertheless amount to an indirect overpayment of pilotage dues.

In a number of small Districts, pilot service is paid to the requirements of the Act: a semblance of regulations relating to licensing is made and a pilot boat charge is included in the tariff. This is the case in all the local Pilotage Commission Districts in New Brunswick and Nova Scotia, i.e., Bathurst, Buctouche, Caraquet, Miramichi, Pictou, Pugwash, Restigouche, Richibucto, Shediac and Sheet Harbour. The provisions are all the same but the licence fee varies, e.g., the Bathurst District General By-law states:

“Sec. 24(1). No vessel shall be used as a pilot vessel unless there is in force a pilot vessel licence issued by the Authority.

(2). The Authority may, if satisfied after a survey that a vessel is suitable, issue a pilot vessel licence in respect of it, valid for a period of not more than one year, and may renew any such licence for periods of one year.

(3). The owner of a pilot vessel shall pay to the Authority a fee of \$5.00 for the issue of a pilot vessel licence and a fee of \$1.00 for the renewal of any such licence.”

“Schedule A

Fee for Pilot Boat Service

4. In addition to the dues payable under sections 2 and 3 of this Schedule, all vessels subject to the payment of pilotage dues shall pay a fee of \$15.00 for pilot boat services when entering the District and shall pay a like fee when leaving the District.”

In all these Districts (if the provisions of their By-law are fully implemented), all money collected is pooled and the pilots are paid a share of the net income after paying District and pilots' expenses. There is no provision which establishes what part of the dues is pilot vessel earnings and what part is pilots' earnings.

In view of the principles established earlier, these By-law provisions (except items in the tariff), *inter alia*, prohibitions contained therein and term licences, are null and void. The suitability, or otherwise, of a pilot vessel should be decided by a Pilotage Authority acting in a judicial capacity and basing its judgment on standards and requirements laid down in regulations. These By-laws, as worded, are illegal amendments to the Act because they make a subject which the Act requires to be determined by legislation a matter for executive decision.

These By-law provisions illustrate faulty drafting. One of the rules of interpretation is “different words should not be used to express the same thing” (Driedger's *Legislative Methods and Forms*, p. 247). The regulations quoted refer to “pilot vessels”, while the tariff refers to “pilot boats”. Since the context indicates that both terms are synonymous it is obvious that the discrepancy is caused by loose drafting; the mistake was repeated in all District regulations as a consequence of standardizing texts (vide C. 7, pp. 213 and ff. for the meaning of the terms *vessel*, *ship* and *boat*).

The fourth situation arises in Districts where the regulation in question is limited to fixing pilot vessel earnings which, in all cases, are identified with the pilot boat charge established in the tariff. This appears in the By-laws in all Districts where pilot vessel service (or part of it) is furnished by the Crown, i.e., British Columbia (Brotchie Ledge), New Westminster, Churchill (provided by National Harbours Board), Quebec (Les Escoumains), Saint John, N.B., Halifax, Sydney and St. John's, Newfoundland.

Allowing for the variation in pilot boat charges, the By-law provisions in these Districts are similar to those contained in the Saint John Pilotage District By-law which reads as follows:

“9. . . .

(2) The Supervisor shall pay each month out of the Pilotage Fund the following:

. . .

- (c) to the Receiver General of Canada, any amounts received in payment of charges made for pilot boat services as provided in the Schedule;

...

- (8) For the purposes of this section moneys received on account of the pilot boat charge prescribed in the Schedule shall be deemed not to be pilotage dues.

...

Schedule

- 9. A charge of \$10.00 is payable on each occasion that a pilot boat is used to transport a pilot to or from a vessel at anchor or entering or leaving the District."

The By-law is essentially incomplete in that it contains no regulation relating to licensing.

Subsec. 9(2)(c) of the Saint John By-law provides indirectly for sharing earnings between the pilots and the pilot vessel owner by stating that the pilot boat charge in the tariff is the price charged for pilot vessel service. As stated earlier, this provision is illegal for three reasons:

- (a) Since no pilot vessel licences have been issued, no licensed pilot vessel is bound by the regulations.
- (b) Indirectly it gives a franchise to the Crown to provide pilot vessel service by stipulating that all pilot boat charges shall be paid to the Receiver General of Canada. Therefore, if a pilot uses a pilot vessel which does not belong to the Crown, the pilot vessel charge is paid by the ship but, according to the By-law, since it was a fee earned by a pilot vessel, it has to be paid to the Crown, which did not render the service. Nevertheless, the pilot remains responsible for paying the cost of the pilot vessel out of his own pocket.
- (c) As seen earlier (vide C. 6, p. 182 and ff.), a Pilotage Authority has no power to pay out any part of pilotage dues collected for pilotage services to anyone but its licensees and only in the instances provided for in the Act. There is no statutory exception for Government-owned pilot vessels as such.

Despite these irregularities and the resultant infringements on the basic rights of the pilots, this situation has never caused conflict or difficulty because, in fact, wherever this service is provided by the Crown it amounts to an indirect subsidy. Originally the service was free but a fee is now charged. However, the Crown charges the pilots far less than any private contractor would demand for a service offering the same standard of safety and reliability. Furthermore, the practice of having only one reliable pilot vessel operator meets present day needs for a controlled pilotage service.

The British Columbia By-law also contains an exceptional provision which is rendered necessary by the fact that it is a coastal District to which access can be gained by many routes, thus making it impossible to operate a pilot vessel service except at peak traffic points. Subsec. 13(3) of the Schedule containing the tariff reads as follows:

“13(3). Where a boat is hired for the purpose of embarking or disembarking a pilot at a point other than at the pilot boarding station of Brotchie Ledge one-half the charge for the hire of such boat is payable by the vessel embarking or disembarking the pilot.”

By Treasury Board Minute P.C. 1959-19/1093, dated August 27, 1959 the Crown undertook, *inter alia*, to provide regular pilot vessel service off Victoria and to assume half the cost of hiring pilot vessels elsewhere in the District (for background vide C. 5, p. 121). In the latter case, therefore, the pilot vessel fee charged to ships as pilotage dues is one-half the cost of hiring pilot vessels. This provision is not strictly legal because all items which form part of pilotage dues should be fixed directly or indirectly in the tariff. If neither the Crown nor shipping interests have any legal control over price-fixing, there may be abuses.

The fifth situation is found in the By-laws of the District of Prince Edward Island where a pilot boat must be used each time pilotage is performed, except for movages from one berth to another. The evidence has established that some pilots own and operate their own boats, while others always employ a fisherman or other boat owner. Although there is no regulation the tariff provides for pilot boat charges which have to be paid by vessels in all cases. However, when the services of a private operator are used these charges are not binding on him and he could demand higher remuneration. In such a case the pilot concerned is personally responsible for the difference.

COMMENTS

Since sec. 364 C.S.A. imposes an imperative duty on each Pilotage Authority to license every pilot vessel regularly employed as such in its District, two conclusions must be drawn from an analysis of the By-law provisions in this matter: (a) the Pilotage Authorities have failed in the discharge of their duties by not making the necessary regulations to enable pilot vessels to be properly licensed; (b) the Department of Transport, which serves as liaison between the Pilotage Authority and the Governor in Council for the approval of By-laws, is also to blame for not recommending that these By-laws be not approved on the ground that they were deficient in this regard. If the Department came to the conclusion that, in the existing circumstances, licensing of pilot vessels no longer had any useful application, it was its duty to submit the question to Parliament in the form of an appropriate amendment to the Canada Shipping Act so that Parliament

might decide. Until and unless such an amendment is passed, neither the Pilotage Authorities nor the Department has any right to ignore the law.

(b) *Providing aid for the support of pilot vessels* (subsec. 329(c)). This provision authorizes the passing of regulations for promoting the establishment of companies of pilots to operate pilot vessels. This provision dates back to the 1873 Act and refers to a situation which no longer exists. It deals with a case of exception to the free exercise of pilotage as a profession. On account of the expense entailed it is, in certain places, beyond the financial means of any individual pilot to own and operate a suitable pilot vessel. In order to remedy this situation, the pilots of the Districts concerned were encouraged to enter into partnerships to operate pilot vessels which competed for clients.

In 1778, an ordinance by Governor Dorchester grouped the Quebec pilots into companies of two per pilot boat. In the Saint John District where larger boats were required, a prerequisite for a pilot's licence was to own not less than four tons of a pilot vessel and the partnership per pilot vessel was composed of seven to ten pilots.

The special system that existed in Quebec between 1860 and 1905 did not come within the scope of this provision. The situation differed basically because the 1860 Quebec Pilot's Corporation Act did away with competition and all the 280 pilots were compulsorily grouped into a single partnership.

Subsec. 329(c) can not be construed as authorizing a Pilotage Authority to control or operate a pilot vessel service. Again it is merely one of the subject-matters upon which the Pilotage Authority is authorized to legislate and there is nothing in the subsection which permits an Authority to increase its own administrative powers by legislation.

Subsec. (c) no longer has any practical significance. For many years no regulation has been made under it and it is believed that, in the light of existing conditions, its retention is no longer warranted.

3. REGULATIONS REGARDING ENQUIRIES (subsec. 329(f)) AND SETTLEMENT OF DISPUTES (subsec. 329(k)). A provision buried in subsec. 329(f) gives power to Pilotage Authorities to establish by regulation the procedure to be followed at *enquiries* they are authorized to hold or to have carried out on their behalf under Part VI. Very little use is made of this power. An *ad hoc* procedure is provided for dealing with specific matters, but no By-law contains a code of general rules governing enquiries.

Since the question is studied at length in chapter 9, suffice to say here that the lack of interest on the part of Pilotage Authorities in a matter so vital to the effective and efficient discharge of their duties and responsibilities may be caused by the limited scope of their powers of investigation and the absence of effective means to conduct a full investigation. An additional reason may be the habit contracted over the years (apparently for the sake of expediency) of dealing with these matters in a most haphazard manner.

The specific cases where a procedure is specified in the regulations are the investigations required to implement subsecs. 329(g) and (j). All by-laws contain some regulations regarding the exercise of judicial powers by the Pilotage Authority with regard to the discipline of pilots, purportedly under the authority of subsec. 329(g), but only a semblance of rules of procedure is enunciated. In By-laws recently amended, such as sec. 23 of the Halifax District (1966 By-law amendment), the situation is even worse from the procedural point of view. This section provides only that the Pilotage Authority "may appoint a person to hold an enquiry to determine the validity of the charge", but no procedure is laid down stating how the enquiry is to be carried out, nor how the charge is to be laid, nor how the accused is to be afforded the opportunity to provide his defence (C. 9, pp. 397 and ff.).

The procedure is complete for regulations passed under subsec. 329(j) but, as will be seen later in chapter 9, the adequacy of the methods employed is questionable.

With reference to *disputes*, subsec. 329(k) authorizes the Pilotage Authority to provide by regulation the procedure "for the adjustment and decision of questions and disputes . . . respecting pilotage matters".

Most Pilotage Authorities have not taken advantage of this regulation-making power, with the result that, in the absence of procedure, this quasi-judicial power can not be exercised.

The By-laws of some Commission Districts, i.e., Botwood, Caraquet, Humber Arm, New Westminster, Pictou, Port aux Basques and Pugwash, contain the same general provision which reads as follows:

"All questions and disputes arising among pilots, masters of ships and other persons respecting pilotage matters shall be referred to the Authority in writing for adjustment and decision; and the decision of the Authority shall be final."

It is considered that this By-law provision goes beyond the power of regulation-making granted by subsec. (k) in that, in addition to providing a semblance of procedure, it contains substantive law, i.e., denies the parties concerned the right to be informed of the allegations made by the other litigant and to appear and present orally or in writing whatever evidence may be pertinent to the case. The only rule of procedure contained in this regulation is that a statement of the case is to be filed in writing by either litigant, upon receipt of which the Authority is empowered to render a decision final and binding upon both parties, and all without any form of trial.

The basic deficiency of this By-law provision and the absence of any provision on the matter in the By-laws of the other Pilotage Districts indicate that the power to settle disputes is not exercised in any way by any Pilotage Authority. This is probably due to the fact that under the present organization there is little cause for serious contention between pilots and Masters.

Formerly, under the competitive system, more than one pilot often claimed dues on the ground that each had been the first to offer his services on an inward voyage. The Robb Royal Commission reported in 1919 that the main trouble in Saint John, N.B. was caused by disputes between pilots and Masters, and even among pilots themselves, which resulted from the competitive arrangements then existing "whereby a ship may be called upon to pay two pilotages, owing to not taking a pilot who claims to have offered his services first, and not being seen by the ship".

COMMENTS

The question whether such quasi-judicial power should be retained will be determined by the rôle the Pilotage Authority is to play in the future, bearing in mind that whenever a Pilotage Authority itself becomes, directly or indirectly, a party to a dispute it is no longer in a position to pass disinterested, unbiased judgment.

4. CREATION OF PILOT FUNDS (subsec. 319(l), 1934 C.S.A. and subsec. 329(m), 1952 C.S.A.). These subsections authorize any Pilotage Authority, except Quebec, to create a pilot fund alone or as part of a group by providing in its By-law the terms and conditions of the fund, the beneficiaries and the benefits. However, fixing the compulsory contributions of the pilots is no longer a matter of regulations; a minimum contribution of 5 per cent of each pilot's earnings is fixed in the Act and since 1934 the actual amount is to be fixed by agreement between the Pilotage Authority and its pilots and, in case of disagreement, is fixed by the Minister acting as arbitrator. Despite this basic change, the matter continues to be covered in By-laws by provisions which are in contradiction with the statutory provisions of the Act and are, therefore, *ultra vires* (vide p. 298). This point will be analysed later and the whole question of the present situation of the various *Pilot Funds* will be the subject of chapter 10 (vide also p. 298 *infra* re grammatical error in text).

Subsec. 329(l) of the 1952 Act is not yet in force. By virtue of a restriction contained in sec. 734, C.S.A., the former provision, i.e., subsec. 319(l) of the 1934 Act is to remain in operation until the new subsection is proclaimed. This has not yet been done. The only difference is that in the new subsection the exception concerning the Quebec District is deleted, thus depriving the Quebec Pilots' Corporation of the administration and trusteeship of their Pilot Fund which they have held since 1875 (vide Quebec Pilotage District). It appears that the Government has not yet considered it advisable for the Pilotage Authority of Quebec to take over the pilot fund from the Corporation.

5. REGULATIONS ON DELEGATION OF POWERS. Normally a Crown agent must exercise the functions and duties imposed on him by Parliament and can not delegate any of his powers unless he is specifically authorized to do so

by a statutory provision. Such an exception is provided for Pilotage Authorities on two occasions in C.S.A. Part VI, i.e., subsecs. 327(2) and 329(p), the pertinent parts of which read as follows:

“327 . . .

- (2) Whenever the Minister is appointed as pilotage authority . . . his successors . . . or any Minister acting for him or, his lawful deputy, shall be the pilotage authority, and any such pilotage authority may by by-law confirmed by the Governor in Council authorize the Superintendent of Pilots in the district to exercise any of his functions, and, for such time or such purpose as he may decide, authorize any person to exercise any particular function or power vested in the pilotage authority by this Act or any by-law made hereunder.”

“329 . . . every pilotage authority shall . . . have power . . . by by-law confirmed by the Governor-in-Council, to

- (p) authorize the pilotage authority to delegate to any person or persons either generally or with reference to any particular matter all or any of the powers of such pilotage authority.”

This power to delegate is a novel concept in Canadian pilotage legislation.

As a rule, when Parliament enacts a statute creating an agency or office on which powers are conferred, these powers must be exercised by the agent or the officer concerned and can not be delegated. Former pilotage legislation observed this principle which was consistent with the type of pilotage organization in effect at the time, i.e., an independent area under the direction of a Board which was in constant attendance. This Board alone was authorized to exercise the powers conferred on the Pilotage Authority, and its Secretary and Treasurer had clerical responsibilities only.

The Quebec Trinity House Act, for instance, stipulated that the examination of pilot candidates was to be carried out by Trinity House itself in the presence of any branch pilot who wished to attend. In 1893, a sentence pronounced against a Montreal pilot involved in a shipping casualty was quashed because it had been imposed, not by the Pilotage Authority, but by a committee appointed by the Authority. The Court found that the Montreal Harbour Commissioners (then the Montreal Pilotage Authority) had no power to delegate this function to a committee. The sentence was considered an absolute nullity which could not be remedied even by the acquiescence of the accused in the proceedings (*Toupin v les Commissaires du Havre de Montréal*, 1893, 4 C.S. 43).

This rule was first broken in 1933 as a result of the situation created in certain large Districts by the appointment of the Minister of Transport as Pilotage Authority. His permanent absence from these Districts combined

with his departmental duties prevented him from giving personal attention to most of his responsibilities as Pilotage Authority. Furthermore, it was doubtless realized that the delays caused by having to refer all matters to Ottawa for decision were prejudicial to efficient District administration. Hence, 23-24 Geo. V c. 52 (now subsec. 327(2) C.S.A.) was passed in 1933 conferring on the Pilotage Authority whenever the Minister was appointed as such, and only then, power to delegate by legislation any of his functions or powers, either to the District Superintendent of Pilots or to any other named person, at his discretion. In view of the fact that the type of delegation provided for is strictly legislative (i.e., the delegated power should be fully described and the delegation completed in the District By-law) once the By-law is approved, the specified powers are automatically vested in the named delegate and the delegation can be cancelled only by making a new regulation.

When the Canada Shipping Act was revised in 1934, the same power, but with a different procedure, was extended to all Pilotage Authorities by the addition of subsec. 319(p), which became subsec. 329(p) in the last consolidation of the Act, and, for unknown reasons, the 1933 legislation was retained as a separate section (now subsec. 327(2) C.S.A.).

The power conferred by subsec. 329(p) is, in effect, the same as provided by subsec. 327(2) except that it is granted to all Pilotage Authorities, and also may take effect in two stages, i.e., legislative authorization to delegate followed by action under such authorization. As in subsec. 327(2) the nature and extent of the delegation of power and the identification of the delegate must be defined in the regulations. An authorization is valid only when the person appointed, and his powers, are defined in the By-law. To leave any discretion to any one in a regulation is not authorizing by legislation but delegating power to authorize, and this the Pilotage Authority, as legislative authority, is not empowered to do.

Whether a regulation is passed under subsec. 327(2) or subsec. 329(p), it must identify without ambiguity any person to whom a delegation of power is made, normally by referring to the office he holds, e.g., Superintendent of Pilots, senior pilot, or chief officer of Customs. When this person is identified by the office he holds, it is a prerequisite for him to be the lawful holder of that office. For instance, when powers are delegated to the Secretary of a Pilotage Authority no one can exercise these powers except the person who holds that office by appointment from the Pilotage Authority duly sanctioned by the Governor in Council pursuant to sec. 328. Again, if powers are delegated to the Superintendent of Pilots in a District, only the person who holds that appointment from the Pilotage Authority is authorized to act. The evidence has revealed that in local Commission Districts, only very few of the secretary-treasurers hold a legal appointment because the sanction of the Governor in Council has not been obtained and in all Districts where the Minister is the Pilotage Authority, no Supervisor or Superintendent holds an appointment from the Authority as such. They are

merely employees of the Department of Transport who have been engaged by the Civil Service Commission which holds no mandate from the Pilotage Authority to appoint its representatives. Such a mandate would be a delegation of power and, therefore, can not be valid under either section of the Act unless it is contained in the District By-law. This is not the case at present.

A regulation providing for a delegation of power to someone who can not be clearly identified makes an improper use of power to delegate. If the Act is amended on this matter, it is considered that the identity of each single appointee should always be fully established by regulation but the rule might be relaxed somewhat if powers are to be exercised by a board. The appointment, or designation, of a single appointee should be contained in a regulation as a means of control because, in effect, the delegate becomes an officer of the Crown for whose wrong-doing the Crown is answerable. Measures ought to be taken to ensure that the powers Parliament has given to a Crown agent (in this case the Pilotage Authority) do not fall into untrustworthy or unqualified hands. The qualifications of a delegate should always be covered in a regulation but, depending upon the nature and extent of the power to be delegated, other factors may also be equally important. Delegation of authority is a trust, and it is the responsibility of the delegator to ensure that the delegate is reliable. Such a duty can not be discharged without the latter's identity being established by the Pilotage Authority and, since this is part of its legislative responsibilities, identification must be by regulation.

When delegated powers are to be exercised by a board, the identification, in future legislation, of all its members need not be complete. There is no basic objection if the appointment of some members of a board is left to the discretion of third parties named in the regulation, provided the qualifications of those members are stated in the regulation. For instance, if it is felt advisable to give pilots the privilege of choosing one of their number as their representative on the Board of Examiners it would be prudent to add in the regulation what qualifications the pilot should have, e.g., a minimum of 10 years active exercise of the profession or Grade A pilot. By such a procedure the regulation-making authority ensures that the representative is competent and qualified to make a meaningful contribution to the Board of Examiners. If blanket authority is left to the pilots they may elect the least qualified simply because he is available or gains the support of the majority. Such representation is not permitted at present but if it is ever authorized, the pertinent provision in the statute should be carefully worded to void unqualified delegation of authority.

The second aspect of delegating powers, i.e., acting upon authorization, may take the form of either an executive or a legislative order. No doubt that explains why Parliament employed such unusual wording in subsec. 329(p); if the term "pilotage authority" had been qualified when used for the second

time by referring only to its administrative function, the result would have been to deprive a Pilotage Authority consisting of a board from making a firm delegation of powers. The inclusion in a regulation of a firm delegation indicates not only that the delegation is authorized, but that the Pilotage Authority has acted upon it. To say in a regulation that "the Secretary is authorized to . . . " has the same meaning as "the Pilotage Authority is given the power to authorize its Secretary to. . . and the Pilotage Authority, acting upon such power, does hereby authorize its Secretary to. . .". Therefore, since under subsec. 329(p) any Pilotage Authority may do what only the Minister could do in 1933 under subsec. 327(2), it is not clear what useful purpose subsec. 327(2) now serves. Since it appears to be only an unnecessary duplication, it is considered it should have been revoked.

But under subsec. 329(p) a delegation of powers defined in a regulation may also be brought into effect by an administrative order. In such a case, delegation is virtual until it becomes actual at a time selected by the administrative authority. If a regulation contains a firm delegation, an amendment to the By-law is required to effect cancellation, but if the delegation takes effect as a result of an administrative order, another administrative order is sufficient to cancel it, and the administrative authority may revive it as often as required by further administrative orders.

The reason for the difference between the provisions of subsec. 329(p) and subsec. 327(2) is found in the basic difference between the two types of Pilotage Authority. A local board need not, and, as a rule should not, bind itself by a firm delegation. It is only in very exceptional circumstances that a Crown agent should resort to delegation because the discharge of his duties is, and always remains, his own personal responsibility and he alone is answerable to the Crown. Since a board is always on location in its District it should retain, at all times, the right to exercise most of its powers alone. In dealing with current problems it then becomes a question whether a particular matter should be attended to by the board, or by delegation of authority, if and as provided for in the By-law. Conversely, when the Minister is Pilotage Authority, firm delegation is indicated as a matter of course, for the reasons which prompted the 1933 legislation, as seen above. However, the other procedure is now also open to him.

The generality of the terms of subsec. 329(p) (and to the same extent subsec. 327(2)) raises another question of interpretation: whether or not the power to make regulations is among the powers a Pilotage Authority may delegate. It appears that only administrative functions and powers are subject to delegation by a Pilotage Authority.

There is a basic difference between the two types of powers. The rôle of Parliament is to legislate, not to administer, and, hence, administration is effected by Crown officers (improperly called, from the delegation point of view, *Crown agents*) whose offices and powers are created by legislation. The

administrative powers vested in a Pilotage Authority are not delegated powers but original powers which Parliament could not exercise in a practical sense. Conversely, regulation-making powers possessed by a Pilotage Authority are essentially delegated powers. A cardinal rule of interpretation is that a person who enjoys a delegated power can not delegate any part of that power without specific authorization by statute. "*Delegatus non potest delegare*". Since the delegation of legislative power to a regulation-making authority is a procedure of exception, the terms of delegation should be strictly interpreted to obviate all doubt and ambiguity. *A fortiori*, this rule also applies to sub-delegation of legislative power, which is authorized unless there is a specific, enabling statutory provision. Existing legislation authorizes a Pilotage Authority to delegate by regulation its own functions and powers but not the functions of Parliament, i.e., to delegate but not to sub-delegate.

As far as legislative authority is concerned, it should be noted different levels of authority are justified only when a definite requirement exists. In such a case a specific delegation of powers is always desirable and an indiscriminate delegation of legislative authority is never warranted. Under the organizational scheme of Part VI, which foresees autonomous and self-supporting Pilotage Authorities, there is no need for any such sub-delegation. However, the power to sub-delegate legislative authority may well be indicated if future legislation creates a central Pilotage Authority endowed with legislative powers in certain fields. If regulations of general application are not indicated, it would be quite proper for the central authority, if so empowered, to sub-delegate to local Pilotage Authorities the power to legislate on these subject-matters in order to meet local requirements. Such legislation would, of course, be valid only for the District concerned.

It should be remembered that such sub-delegated power remains a power of legislation and, therefore, can be discharged only in the form of regulations which, *ipso facto*, become subject to the prevailing regulation-making procedure, i.e., under the present legislation, the Governor in Council's approval (subsec. 331(1) C.S.A.) and the Regulations Act. It is, therefore, an improper sub-delegation of a legislative power to stipulate that conditions and requirements are left at some person's discretion because this would amount to converting a legislative power into an administrative power, a step which is not permissible.

A delegation of authority does not mean abandonment of authority. A delegator does not lose a power he has delegated and a delegate may exercise the power so delegated as if he were the delegator, and both may then exercise it. The delegator retains the superior position and, therefore, may overrule any decision taken by his delegate, except when rights have been acquired by third parties as a result of the delegate's decisions. For instance, if a Superintendent who is authorized to hold an inquiry decides not to proceed, the decision does not create any right and may be overruled by the

Pilotage Authority, but if the Superintendent is given licensing authority, any licences legally granted by him can not be cancelled for that reason by the Pilotage Authority.

Under existing legislation it is not possible to make delegated power exercisable by a delegate alone. Since the Pilotage Authority is the delegator, the possession of the powers being delegated becomes a prerequisite to the delegation, and since the Pilotage Authority received these powers from Parliament, it has no right, unless so authorized by the Act, to abandon them. However, for the sake of good administration, it might be desirable, in certain areas, to allow a certain finality for delegates' actions and decisions. The evidence has shown that the existence of a higher authority who can overrule any decision of a delegate on any ground amounts, in fact, to a denial of the delegate's powers and, hence, the purpose of the delegation is not achieved. An unfavourable decision is likely to be appealed if all those who are in a position to pass judgment can have it altered, i.e., where the Minister is the Pilotage Authority, the departmental officers concerned all the way up to the Deputy Minister, and even to the Minister. This undermines the authority of the delegates who soon shy away from taking responsibility for fear of being overruled. Appropriate statutory provisions will be required to prevent arbitrary decisions. However, if a decision results from the exercise of a discretionary power, the delegator should not retain the power to intervene.

FACTS AND COMMENTS

Very little use is made of the power of delegation, even by the Minister as Pilotage Authority. In District By-laws four types of delegation occur:

- (a) to the Secretary or the District Superintendent;
- (b) to the Board of Examiners over candidates' professional competence;
- (c) to a medical officer or board over pilots' physical and mental fitness;
- (d) to the Investigating Officer in a disciplinary case.

Most of the powers delegated to the Secretary or the Superintendent are managerial in character and most of these are *ultra vires*. The evidence has revealed that Superintendents make very little use of the powers so delegated because of the "centralization attitude" of the Ottawa-based advisers to the Minister as Pilotage Authority. The effect of the delegation is defeated because local representatives take no responsibility either for fear of disapproval from superiors, or for lack of rules and policies from the Authority, with the result that even minute details of local administration are handled in Ottawa to the detriment of efficiency. It is considered that if the possibility of a non-resident type of Pilotage Authority is to be entertained, future legislation should be drafted to make fuller use of the power of delegation and to

provide that most administrative decisions are dealt with at local level. The powers of such a non-resident Authority would then be limited to questions of policy and to establishing criteria both in regulations and administrative rules to guide local officials. For instance, as far as licensing new pilots is concerned, the Pilotage Authority (unless it is located in the District) should have its activities limited to establishing qualifications, type of apprenticeship, number of pilots, types of licence and similar matters, all by regulation. The implementation of these regulations should be delegated to a local person, e.g., the Superintendent, who would be responsible for convening the Board of Examiners whenever a vacancy occurs whether caused by the departure of a pilot or by an increase in the numbers approved by a regulation made by the Pilotage Authority. On receipt of a favourable report from the Board of Examiners the Superintendent should be authorized to issue licences automatically without having to seek *ad hoc* authorization and direction from his superiors.

The mandate of the Board of Examiners is generally well defined in the regulations but the method of appointment is faulty in that the complete designation of each member is not contained in the regulations. As an example the provisions for the appointment of the Board of Examiners in the Bathurst District By-law are irregular or at least incomplete:

“11 (1) There shall be a Board of Examiners consisting of three members appointed by the Authority.”

Although it is more elaborate, the B.C. District By-law is also irregular in that only one of the five members is clearly identified and the four others have to rely for appointment on the discretionary power of other parties. Sec. 16 of the B.C. By-law reads as follows:

“16. There shall be a Board of Examiners composed of

- (a) two representatives of the Authority, one of whom shall be the Superintendent who shall be the Chairman;
- (b) a member of the Pilot's Committee who shall be selected by that Committee;
- (c) a pilot of the District who shall be appointed by the Superintendent; and
- (d) a master mariner who shall be appointed by the Authority.”

The fact that as a rule the appointment of some members is left to the entire discretion of an authority or a group of persons does not necessarily mean that it meets an actual need: very often it is either an easy and non-committal way of performing a regulation-making duty or a compromise solution to a contentious problem. Precise identification means amendments to the regulations when circumstances change and no matter how tedious this may appear to be, it is the very purpose of legislation by regulation in that

features of a temporary character can be easily dealt with by this summary, simplified legislative process. The designation by regulation of the members of a board or committee is a legislative function which defines policy, but, because it deals with problems in the abstract, it may give rise to controversy. Hence, the easy way out is often taken by dealing with the matter on an *ad hoc* basis without establishing any rule. This solution is irregular because a legislative responsibility is transformed into an executive power.

Nor does the present statute permit a Pilotage Authority to appoint (assuming such an appointment is permissible), anyone to hold an investigation which is part of the disciplinary process, unless identification is contained in the regulations. Subsec. 329(f) authorizes a Pilotage Authority to make regulations for holding enquiries either by it or by some other person on its behalf, but the power to carry out investigations and to have them carried out by others must be found elsewhere. As will be indicated later in chapter 9, a Pilotage Authority has almost no power of inquiry and no direct power of discipline. But any blanket power of appointment given by regulations to the Pilotage Authority (such as sec. 23 of the Halifax 1966 By-law) is illegal, *inter alia*, because neither the required qualification nor the identity of the appointee is included in the By-law. Furthermore, it is considered that such undefined delegation should never be permitted on account of the consequences its exercise implies. Since the findings of an enquiry entail decisions of major importance to the pilot concerned, it is most important that at least the qualifications of the presiding officer should be set out in the regulations in order to avoid abuses and any resultant injustice.

The wording of subsec. 329(p) is another example of unsatisfactory drafting because it lacks clarity and is open to various conflicting interpretations which may be the cause of confusion and contention.

6. REGULATIONS RE EXEMPTIONS (subsecs. 346(c), 346(h), sec. 347 and subsec. 357(2)). In Districts where the Governor in Council has made the payment of dues compulsory, the Pilotage Authority is authorized to grant some exemptions and to withdraw or vary others granted by the Act (vide C. 7).

As previously stated (C. 7, p. 212), the primary purpose of the compulsory payment system is to ensure regular employment for the pilots, thus allowing them to gain the experience they require to maintain and improve their qualifications. Under present circumstances, and even more so in the future, safety of navigation ought to be the determining factor. Since all these questions must necessarily be decided on the basis of local conditions, marginal cases must be left to local authorities. For this reason the Act divides vessels into three classes for exemption purposes: (a) all exemptions are denied, (b) absolute exemption, and (c) exemptions dependent on regulations passed by the Pilotage Authority (vide C. 7, p. 221 and *seq.*).

Subsec. 346(h) creates a problem in that it is not clear whether decisions by a Pilotage Authority to exempt or not to exempt a warship or hospital ship of a foreign country are legislative or administrative. The text requires clarification. At first sight, these decisions appear to be legislative because in effect they amend legislation, but such an interpretation would defeat the very purpose of the power granted because it would be incompatible with the circumstantial context. If these orders are of a legislative nature, the registration and publicity procedure of the Regulations Act would apply, the approval of the Governor in Council would be required and, furthermore, the matter would have to be dealt with in terms of policy and not on an *ad hoc* basis. The situation contemplated here is, in fact, of a very exceptional character because warships and hospital ships of foreign nations seldom call at Canadian ports. To make regulations means to establish rules; hence, where no rule is indicated no regulation is necessary, and each case should be dealt with on its merits.

7. COMMENTS ON REGULATION-MAKING POWERS AND THEIR USE. The regulation-making powers granted to a Pilotage Authority are adequate in substance for the type of Pilotage Authority and the scheme of organization now provided in the Act, i.e., simply a licensing authority and a pilotage service provided by free entrepreneurs. However, these powers are completely inadequate in the context of present day pilotage needs and, therefore, if the function of the Pilotage Authority is modified in future legislation, the scope of regulation-making powers should be revised and enlarged.

The description of subject-matters leaves much to be desired in language, form, clarity and logical arrangement. Most of the essential rules of drafting have been contravened. Flagrant mistakes cast doubt on the applicability of the normal rules of interpretation regarding the remainder of the legislation, e.g., too strict a meaning can not be attached to the wording of the 1934 amendments when the haphazard manner in which they were drafted and the mistakes they contain are realized. For instance, from a strictly grammatical point of view, the last part of subsec. 319(1) (1934 C.S.A.) can only be interpreted as meaning that the minimum contribution of pilots towards the pilot fund ought to be not less than 5 per cent of the Minister of Transport's own earnings. This obvious grammatical error which was made in 1934 has not yet been corrected, and was even repeated when the Act was consolidated in 1952 (subsec. 329(1)).

It is inexplicable why so many ultra vires regulations have been made and approved. It can be understood that some local Pilotage Authorities whose members have no legal training and little experience with legislative language may misinterpret their rôle and their powers and, therefore, may be prompted to include ultra vires provisions in their By-laws. The same may also be true of specialists in marine matters who act as advisers to the

Minister as Pilotage Authority, if no legal direction is given to them as to the scope of the Act and the meaning of its various provisions.

What is difficult to understand is how ultra vires By-laws prepared by these persons can pass unnoticed by the various legal advisers whose duty it is to check them, both in the Department of Transport and with the Department of Justice, before they receive the Governor in Council's approval.

It is conceded that slight irregularities are always liable to pass unnoticed and that it is possible to include provisions whose legality depends upon the interpretation given to other provisions of the Act and which, therefore, are not patently illegal. But it is inconceivable that so many ultra vires provisions were allowed to be made, some of them so flagrant that it is incomprehensible how they passed unnoticed. It is considered that the first duty of reviewing legal officers is to ensure that statutory authority exists for each provision of a proposed by-law and also that the proposed regulations do not conflict with the legislation taken as a whole.

The present method of fixing the compulsory contribution of the pilots to their pilot fund is a good illustration (among many others) of this point. Since 1934 the question has ceased to be an absolute subject-matter of the legislative power of the Pilotage Authority. In the last part of subsec. 319(1), 1934 C.S.A., Parliament imposed a condition and established a procedure. For once, the provision is expressed in clear, simple terms (except for the grammatical mistake referred to earlier). The Pilotage Authority alone now has no power to fix the amount of contributions—this must be decided by agreement between the Pilotage Authority and its pilots and, if this proves impossible, the amount is then fixed by the Minister of Transport, acting as arbitrator. The amazing fact is that, in every District where there is a pilot fund administered by its Pilotage Authority, no heed is taken of the amendment, every By-law contradicts the imperative provisions of the Act and, hence, is ultra vires. The Halifax By-law gives full discretionary power to the Pilotage Authority, without consulting the pilots, on the basis of an actuarial valuation. In other Districts the Pilotage Authority has the final decision. The pilots are given only a consultative rôle through their Pilot's Committee whose authority is not founded on any provisions of the Act. In the British Columbia District, as a result of a 1966 By-law amendment, the amount is determined at the end of each year by the Pilots' Committee and neither the Pilotage Authority nor the Minister shares in the decision. That such action has been taken because the Minister is the Pilotage Authority in those Districts and the By-law is merely a simplification of the procedure defined in the Act, can not be accepted as a valid reason. Since the office of Pilotage Authority and the office of Minister of Transport are two different entities, their only permissible relationship is that the two offices may be held at the same time by the same person. Even this slim excuse can not be offered for Districts where the Minister is not the Pilotage Authority, such as New Westminster.

B. LICENSING POWER

The licensing function of Pilotage Authorities is the basic feature of the pilotage organization provided by Part VI of the Canada Shipping Act. Therefore, the various sections dealing with licensing power must be correctly understood because all other powers with which Pilotage Authorities are endowed depend upon the proper implementation of licensing. Otherwise, except a few sections of general application, the remaining provisions of Part VI are meaningless.

Licensing is an administrative function of a *quasi-judicial character*. When a licence is granted it means, in essence, that the candidate meets the requirements and standards detailed in legislation. A Pilotage Authority has no discretion in this regard but must be guided by the prescribed legislative criteria. Any candidate has an absolute right to be licensed if he complies with the conditions imposed by legislation and meets the required standard, *onus probandi*. When licensing jurisdiction over the number of licences that may be issued is unlimited, a Pilotage Authority is bound to issue licences to every applicant who fulfills the requirements. An applicant can not be failed because the Authority considers he lacks qualifications which are not required by legislation. As far as licensing is concerned, the Authority is bound by the provisions of the Act and of the regulations as they stand at the time. If a candidate is failed under these circumstances, he is entitled to seek redress by prerogative proceedings against an abuse of authority. Conversely, no matter how exceptional the circumstances may be, a licensing authority can not pass an applicant who does not meet the legislative requirements, for such action would also be an abuse of power which would nullify the licence. If the criteria set out in the regulations are considered deficient or excessive, it is the responsibility of the licensing authority to take the necessary steps to have them modified without delay, but until this is done the regulations as they stand are the law. If an emergency arises due to a shortage of pilots, the remedy is not to license unqualified pilots, but to inform Masters and agents and allow them to employ any unlicensed persons they choose. Under such circumstances, a responsible Pilotage Authority would render Masters and agents a service by stating which non-licensed persons are best qualified, e.g., retired pilots; Masters and officers who have been employed in regular traders; fully qualified apprentices who have not been licensed because there is no vacancy or because they are beyond the age limit; apprentices who are near the completion of their apprenticeship. When the number of pilots is limited, the Pilotage Authority has no discretionary power to accept or reject qualified candidates. It must be guided by the acquired rights of the candidates according to the regulations and, if there are no applicable regulations, it must be guided by equity and the best interests of the pilotage service.

Once a licence is granted, the Pilotage Authority has no control over its duration as long as the holder conforms to the regulations and the Act. It is part of the licensing function to ascertain whether a licence holder continues

to meet requirements and to maintain the necessary standards. However, a Pilotage Authority's right to interfere with the duration of a licence, either by suspension or cancellation, is limited to the instances specified in the Act or in valid regulations. The licensing function also includes and implies a duty of surveillance. In addition to being responsible for ensuring that the Act and regulations are observed, the Pilotage Authority is responsible, within the limits laid down in the Act, that the pilots remain competent, fit and reliable. These responsibilities are studied in chapter 9.

As pointed out before, the absence of legislative criteria for the essential qualifications of a licence holder amounts to a denial of licensing power because, in the absence of standards by which to gauge the competency of a candidate, no judgment can be made. Hence, legislative criteria and rules must be contained either in the statute or in valid regulations.

Types of Licensing

A licence certifies that the holder possesses at least the minimum degree of competence defined in applicable legislation. Pilotage licensees may be divided into two groups:

- (a) the licensees who perform pilotage, i.e., qualified pilots (divided into grades in some Districts), and Masters and mates holding certificates to pilot their own ships. Persons not in possession of a pilot's licence or a pilotage certificate who are employed merely as advisers on local conditions might also be included;
- (b) licensees who provide auxiliary services which enable the pilots to perform their duties, principally pilot vessel operators but, under certain circumstances, those who provide land or air transportation and, in some areas, linesmen and wheelmen.

In group (a), the Canada Shipping Act limits the licensing powers of Pilotage Authorities to pilots, Masters and mates; in group (b), to pilot vessel operators. However, there is no objection to extending licences by appropriate legislation to other persons and services if they are required.

I. Licensing Pilots

The basic purpose of Part VI is licensing pilots. Although this is an absolute power granted to each Pilotage Authority, it is stated only indirectly in the Act but with no possible ambiguity. The Act deals with related questions which become meaningless if such implied power does not exist.

Since licensing is merely a method of controlling the qualifications of persons who apply to act as pilots, and of pilots during the tenure of their licence, the licensing function is incompatible with the status of employer. However, this incompatibility can be overcome quite easily by enacting legislation which gives precedence to the licensing function. Part VI of the present Canada Shipping Act does not contain such a provision.

The incongruity arises because the licensing function covers a field which is normally also covered by the contract of hire. Appraisal of the qualifications of candidates is a prerequisite both to employing and licensing pilots, but the principles and rules applicable to each situation are essentially dissimilar and, furthermore, the relationship between the Pilotage Authority and its pilots is of an entirely different character.

1. WHEN THE AUTHORITY IS THE EMPLOYER, the relationship is contractual and, like other employers, the Pilotage Authority has complete discretion to make a selection from the qualified candidates and to distribute assignments as it sees fit. The status of employee implies not only permission to pilot but also an obligation to perform pilotage duties under the control and direction of the employer. Hence, from that point of view, licensing becomes an unnecessary duplication. The Pilotage Authority's decisions as an employer are essentially administrative in character and are governed by the terms and conditions of the contract that binds both parties. Dismissal or suspension from duty is a unilateral administrative decision by the Pilotage Authority, grounds for which must be based on the contract, e.g., breach of contractual obligations by the pilot. These decisions, however, are always subject to the control of the civil courts. Their function is to ascertain whether the pilot's alleged action or condition amounts to a breach of contract, whether the situation which developed has shown the pilot to be incapable of discharging his contractual obligations and whether, in the given circumstances, the Pilotage Authority had the right to terminate the engagement. Therefore a pilot who believes he has been wronged by such a decision may seek redress by instituting a civil action before a regular tribunal or, in part, through the grievance procedure that may be included in the contract of hire (as is normally the case where collective agreements exist).

In contrast, the licensing authority *per se* has no right to control the pilots in the exercise of their profession by distributing pilotage assignments. The selection of pilots from applicants remains an administrative function but of a quasi-judicial character, because no discretion is left the licensing authority to discriminate among candidates since its decisions are governed by applicable legislation. Dismissal of a pilot from the service resulting from the cancellation of his licence, as well as suspension, must be based on a quasi-judicial decision founded on a precise legislative provision (*vide Reappraisal Function*, chapter 9). Unless a system of appeal is provided, the licensing authority's decision is final and the pilot who believes he has been wrongly dealt with is without recourse, except through prerogative proceedings before the regular courts of civil jurisdiction in those exceptional cases where the licensing authority acted without jurisdiction, or exceeded its jurisdiction, or where the decision rendered was so unjust that the licensing authority was deemed to have exceeded its jurisdiction.

When the pilots are required to have the status both of licensees and employees of the Pilotage Authority, a confused and detrimental situation ensues under present legislation. One consequence is that discharging a pilot employee does not entail the withdrawal of his licence. The licence can be cancelled only for the reasons specified in the Act and by the Pilotage Authority acting in a quasi-judicial capacity, while the termination of employment is an administrative decision which is governed by the terms of the contract. The result in this case is that as long as the discharged pilot retains his licence he may exercise his profession as an independent contractor in competition with the Pilotage Authority's own service.

This incompatibility is at present irreducible merely because the status of employee for pilots is not contemplated in the Act. In future legislation, this could easily be corrected by recognizing that a pilot may hold the status of Crown employee and by retaining possession of a licence as a prerequisite for the exercise of pilotage, whatever his status may be. Such provisions would grant Pilotage Authorities full licensing power (including reappraisal) in all cases.

The Act should also stipulate that licensing provisions take precedence over any private agreements, with the result that holding a pilot's licence would be a prerequisite to all contracts of hiring persons to act as pilots, whether contracts for services or contracts of services, and whether the employer is any department, board or entity of the Crown, or a Pilotage Authority, or a private employer. Observing that pilotage has become necessary in the public interest, the qualifications of pilots must not be left to the mercy of negotiations and private agreements. It follows that the existence of a licensing authority is indicated to protect the interests of the public.

2. WHEN PILOTS ARE MERELY DE FACTO EMPLOYEES OF THE PILOTAGE AUTHORITY, there is incompatibility but to a relative degree only. The Authority can no longer be unbiased because it has assumed the responsibilities involved in providing pilotage services. A true master-servant relationship does not exist because there is no contract; the engagement is replaced by licensing, and the terms and conditions of the tenure of the licence must be defined in the same legislation that provides the Pilotage Authority with its powers. The fact that the Pilotage Authority controls the exercise of the pilot's profession through the despatching procedure is not an absolute obstacle to the exercise of licensing power because the licensing function remains the sole legal and effective means of control over the qualifications of pilots. As in those cases where the master-servant relationship exists, the Pilotage Authority is best qualified to appraise a pilot's performance. If the Pilotage Authority is the legal employer, appraisal is exercised by the Pilotage Authority because of its contractual rights despite its own interest in the matter. When the Pilotage Authority is only the *de facto* employer, the same procedure should be followed but the appraisal decision should always be

capable of reversal in appeal by an independent and unbiased authority. This *de facto* employee status is not permissible under the present legislation. It is considered this is an omission which should be corrected because such a status meets a definite need of the service.

3. IF A PILOT IS AN EMPLOYEE OF A THIRD PARTY, there is no objection from the licensing point of view since a licence is a prerequisite consideration to the contract of engagement, in that it is a condition precedent to acting as a pilot, and the Pilotage Authority retains its right of surveillance and its power, where so provided, to suspend or cancel licences. The present incompatibility arises from the limited scope of the other provisions of the Act which foresee that a pilot is always a free contractor and that the pilotage dues fixed in the tariff on a per trip basis are the only permissible consideration for the performance of pilotage services by a licensed pilot. Since this situation can not be modified either by regulations or by any private agreement, any other pecuniary consideration or any other type of contract would appear to be null and void. (Vide C. 4, p. 67 and *seq.*). At present, however, there are two licensed pilots who are employees of a private employer. The brothers Desgroseillers are licensed pilots for the Pilotage Districts of both Kingston and Cornwall, and are also in the employ of the Canada Steamship Lines, Limited, as pilots. The fact that they hold licences in the two Districts is because their employment dates from the time when the St. Lawrence-Kingston-Ottawa District was in operation. It appears that other licensed pilots have been privately employed at times to act as such in Pilotage Districts but only occasionally, since little mention is ever made of such employment. There is one reported court case where a pilot sued the Master of a ship for indemnity because he was discharged prior to the termination of his engagement at \$45 per month. The validity of the contract does not appear to have been questioned before the court (1884, 12 R.L. 21, *Zénon Lafrance v Joseph Jackson*).

COMMENT

The facts indicate that existing pilotage legislation is too limited and is not adapted to the multiple and varying needs of the service today. If pilotage is to be of general application, it must have the necessary flexibility to cover all possible situations adequately. Since pilotage is a service, it must be essentially adaptable; therefore, future legislation should foresee and provide for every kind of status pilots may enjoy and should define the nature and extent of the control the Pilotage Authority has over them in each case. This aim could be generally attained by making the licensing system applicable in all cases.

II. Licensing Masters and mates to pilot their own ships

This is no longer an absolute power (as it was for a certain Pilotage Authority in pre-1934 legislation), but may now be exercised by all Pilotage Authorities, provided they pass regulations to that effect. In contrast with the procedure for licensing pilots, which leaves the Pilotage Authority no discretion about passing regulations, each Authority is left to decide whether or not to take advantage of the power to license Masters and officers.

This licensing power is accessory to every type of compulsory system of pilotage. Sec. 11 of the 1913 Pilotage Act of the United Kingdom lists pilotage certificates among the exceptions to compulsory pilotage, together with the non-availability of pilots and exemptions. It is not understood why mention was never made of this exception in sec. 345 C.S.A. and in the corresponding provisions of previous legislation, although the power to issue these certificates always existed and was even expanded in 1934. All Districts now enjoy this licensing power, which applies not only to Canadian-registered vessels as previously, but has been extended to officers of ships of any nationality.

It is a strange phenomenon that despite the foregoing no use is made of this power. Since 1934, no regulation has been passed anywhere in this respect with the result that, in the absence of appropriate regulations, pilotage certificates can not be granted. This is curious in view of the fact that therein lies the solution to many otherwise insoluble problems which some Pilotage Authorities have faced, e.g., the ferries and regular traders of American registry plying between American ports and the Pilotage Districts of New Westminster and British Columbia. It is also a means of adjusting exemptions to ensure that ships whose Masters or mates lack the necessary local knowledge and experience to navigate their own ship safely in District waters are required to take pilots.

The obvious reason is the overt opposition of the pilots to such "white flag certificates" (C. 7, p. 233) which they consider a menace to their profession for, by exempting these vessels, they lose revenue. However, a Pilotage Authority should not consider that its main function is to create increased employment for its pilots, but rather to serve the best interest of shipping and safe navigation.

In certain Districts the need to issue pilotage certificates may be so minimal that it is not worth considering, but in other Districts the Pilotage Authority's failure to act is totally unjustified, and indicates a lack of knowledge or a reluctance to assume responsibility, especially in Districts like Sydney, N.S., and British Columbia, where, contrary to the provision of secs. 328 and 351 of the Act, the Pilotage Authorities misapply dues collected from ships that have not employed pilots by giving them to the pilots. It is no wonder that under these circumstances the Sydney pilots objected bitterly to exempting the C.N.R. ferries running between Sydney and Port aux Basques,

either by way of a statutory exemption or by issuing a pilotage certificate to their Masters or mates, because such action would amount to the loss of about 50% of their personal revenue. In British Columbia the total amount collected in 1965 from non-exempt ships which did not take pilots, including ferries and regular traders such as the Japanese ore carrier *Harriet Maru*, was \$29,887.13. This sum was irregularly credited to the pilots' pool and shared among them as remuneration. This situation is illegal and must be corrected. No doubt the situation would have been quite different if the dues collected from non-exempt ships that did not employ pilots had been applied as required by the Act, i.e., to the Pilot Fund if no pilot offered his services on inward voyages and, for other voyages, to the District operating expense fund (subsec. 351(2) and sec. 328 C.S.A.).

It is considered that, in a system of pilotage based on public interest and safety of navigation, full use should be made of the power to grant pilotage certificates to Masters and mates who qualify, irrespective of their nationality or the ship's country of registry, and thus enable Masters who do not require pilots to dispense with their services, without penalty.

It is also considered that the issue of pilotage certificates should be integrated into the scheme of exemptions. Only vessels which are most unlikely to become a safety risk in the circumstances prevailing in a given District (such as small ships) should be granted a direct exemption and, if an exemption is indicated for any other vessel, it should be made subject to the competence of the Master or mate to navigate in the District.

Here again, whatever the extent of its involvement in providing pilotage services, the Pilotage Authority remains best qualified to discharge this licensing responsibility.

Since experience has shown that Pilotage Authorities are unable to deal freely with this question, mainly because they work so closely with the pilots, it will be necessary to devise appropriate legislative and administrative controls, *inter alia*:

- (a) First, it should be made a statutory right for any Master and mate who possesses the required qualifications to be granted such a personal exemption, either for a whole District or for a given route which he covers regularly.
- (b) Minimum qualifications should be defined by Parliament. Thus, the absence of regulations would not amount to the denial of the right to an exemption (as is now the case).
- (c) Pilotage Authorities should have the power to amend these statutory requirements by regulation in order to meet local requirements.
- (d) Such regulations should be subject to modification by the confirming authority, either *proprio motu* or at the request of any interested party, if they prove discriminatory, abusive or intended to defeat the purpose of the Act.

- (e) The Pilotage Authority's decision as licensing authority should be subject to review in appeal before the Admiralty Court.

A new term should be found to replace "pilotage certificate" which is confusing because of the statutory definition of "pilot". For instance, "personal pilotage exemption" would render the meaning more accurately. Whatever term is selected, it should have a statutory definition so that its intended meaning is unmistakable whenever it is used in legislation. When the definition is prepared, such expressions as "to act as pilot" should be avoided, and it should be made clear that the exemption applies to an individual holder to authorize him to navigate a named ship in which he is employed as Master or mate in a named District or part of a District, or on a given route within a District, without being obligated to employ a pilot or pay pilotage dues.

III. Licensing pilot vessels

The third licensing power concerns licensing an auxiliary service, i.e., water transportation for pilots. Sec. 364 C.S.A. makes it mandatory for each Pilotage Authority to *approve and license every pilot vessel* which is regularly employed as such in its District. Despite this obligation, and although pilot vessels are necessary in all Districts except Cornwall, licences are issued only in a few small Commission Districts. They, however, carry out this duty in a perfunctory and arbitrary manner for lack of criteria in the regulations (vide pp. 280 and *seq.*). Licensing pilot vessels does not differ from any other type of licensing; it is a quasi-judicial procedure which can be discharged only if the regulations contain standards by which to judge the adequacy of vessels proposed for a licence. A Pilotage Authority has no discretion but is bound by the requirements, if any are provided in the regulations and in the Act. In their absence, licensing is impossible. At present, in Districts where the Minister is the Pilotage Authority, no pilot vessel in regular use holds a licence from the Pilotage Authority, despite the fact that some are operated by private contractors. The factual situation has already been analyzed.

The reason why various Pilotage Authorities completely disregard this duty imposed upon them by the Act is the fact that the situation which existed when this provision was first included in the Act has now changed, and they consider there is less need for such licensing control.

1. HISTORICAL BACKGROUND. Sec. 364 has its origin in the early days of pilotage in Canada when transportation to and from vessels was each pilot's own responsibility. In view of the competitive system that then existed, each pilot normally provided his own transportation, either by owning and operating his own pilot vessel, or by hiring someone else's boat, and vied with the other pilots to be in a position to first offer his services to an incoming ship. However, in exposed boarding areas where rough seas were encountered,

individual pilots could not afford a suitable vessel, and the free enterprise system took the form of a partnership centered around pilot vessels which competed with each other.

In the 1788 ordinance of Governor Dorchester the pilot vessel was the basis of the pilotage service and the pilots operated in companies, composed of two pilots with at least one apprentice, who provided themselves with a suitable pilot vessel. A few years later, however, this requirement was abandoned and each pilot was left to fend for himself as a private entrepreneur. He was not even obliged to own a pilot vessel but, if he wished employment, he had to provide his own means of reaching incoming ships. Generally, a Quebec District pilot owned his own pilot boat which was manned by his apprentices who, at great risk, often ventured far outside the boarding area into the Gulf to be the first to meet incoming ships. The system was also prejudicial to the apprentices for, in addition to their precarious life in small and inadequate boats, they had little, if any, opportunity to learn pilotage. Their assistance in manning pilot vessels was so necessary that their Masters were reluctant to release them to obtain their pilot's licence. It required an amendment to the Act in 1847 to protect the apprentices. The situation changed in 1860 when the Quebec pilots won the right to administer their pilotage service and thereby ended the competitive system in the Quebec District. Pilot vessel service was provided at Bic by four schooners owned by the Pilots' Corporation and large enough to provide living accommodation for a number of pilots. Two of these schooners cruised constantly throughout the boarding area to meet vessels. The next change occurred in 1905 when by private agreement with the Pilots' Corporation the Department of Marine took over the pilot vessel service and transferred it to Father Point.

At Saint John, N.B., although free competition existed among the pilots up to the time pilot vessel service was taken over by the Department of Transport, they were forced by circumstances, and later by requirements imposed upon them by the Pilotage Authority by regulation, to group together in order to raise sufficient funds to own and operate a suitable pilot vessel. Navigation conditions off Saint John Harbour necessitate a large vessel which is too expensive for any single pilot to own and operate. Such a vessel was later accepted by the Pilotage Authority as an integral part of the District organization and the 1874 By-law made it a prerequisite for anyone obtaining a pilot's licence to be the registered owner of not less than 4 registered tons of a licensed pilot vessel. At that time, the pilots lived aboard the schooners which served as pilot vessels, pooled their earnings and shared expenses and profits as co-owners. In 1919, the Robb Commission found that many disputes arose between pilot vessels because of the competitive arrangements which still existed. By then, the pilots were divided into two groups, each owning a schooner and each competing against the other. Ships were often

called upon to pay two pilotage charges because both groups demanded payment, each claiming to have been the first to offer services to the incoming ship.

In the early days of pilotage in British Columbia, providing an adequate pilot vessel service for the boarding station off Victoria was a serious problem for the pilots. Here again, circumstances were such that no individual pilot could provide his own pilot vessel out of his earnings with the result that highly qualified mariners lost interest in pilotage as a profession. In 1859, complaints were registered after a series of disasters. In 1860, the pilots petitioned to obtain an increase in pilotage dues and promised to keep a suitable vessel cruising in the boarding area off Race Rocks. Their request was granted but they did not live up to their promises. In 1864, they hired a schooner but a year later reverted to the former practice of remaining ashore and employing a whale-boat manned by a crew of Indians when a vessel was sighted.

The record shows how dangerous it is at times for pilots to board or disembark at boarding stations and how important it is to provide them with safe, adequate pilot vessels. The failure on the part of Pilotage Authorities to make appropriate regulations in this field, and of most Authorities to approve and license pilot vessels, indicates clearly that this statutory requirement no longer fulfills a basic need. It is not suggested that Pilotage Authorities today are no longer concerned about the lives and safety of their pilots or whether efficient, reliable transportation is available to provide a service in all foreseeable weather conditions. This situation has developed as a result of factual changes for the following reasons:

- (a) disappearance of the competitive system;
- (b) statutory inspection requirements for all boats and vessels engaged in public transportation;
- (c) incompatibility of licensing and operating functions when transportation is provided by the Pilotage Authority or by the Crown.

2. DISAPPEARANCE OF COMPETITION. The disappearance of the competitive system began in 1860 when the Quebec Pilots' Corporation was created and gradually occurred in all Districts (vide C. 4, pp. 77 and ff.) when there was no longer any need for a large number of pilot vessels used individually by pilots to enable them to compete for ships.

Only one basic requirement now remains, i.e., to provide an adequate, safe, and efficient means of transportation for pilots embarking or disembarking. Such a service can best be provided by one well-equipped operator and this has since become the rule in every boarding area throughout Canada. The only exception was Quebec Harbour where two operators competed for clients until 1966, when one operator bought out and absorbed his competitor's business. Under present conditions, a number of operators are detrimental to efficiency. Care must be taken to ensure that pilot vessels are suitable

for prevailing conditions in the boarding areas where they operate and that they are also well manned. Thus they will render safe, uninterrupted service despite adverse weather conditions.

These requirements should be recognized and Pilotage Authorities authorized to limit the number of pilot vessel licences to one operator, if necessary; in other words, to grant a franchise for a limited period to the operator who agrees to provide an adequate, efficient service.

A pilot vessel operator with a monopoly is interested in providing the best possible service because he fears that if the pilots suffer any inconvenience they will ask for other arrangements. Now that the competitive system has been abandoned the only interest the pilots retain in pilot vessels is their common concern for a safe, speedy, efficient service. Therefore, the need to licence pilot vessels as a means of control is no longer as imperative as formerly. However, licensing is necessary to grant a franchise on the basis of safety, adequacy and efficiency. Under the present system, a type of franchise automatically follows in that only licensed pilot vessels may offer their services, but, since a Pilotage Authority has no power to limit the number of licences there could be, in theory, a number of pilot vessels competing in a given District, with detrimental results. Furthermore, such competition has no place in a system of fully controlled pilotage.

3. COMPULSORY INSPECTION. The second factor which brought about a fundamental change was the compulsory inspection requirement for vessels and boats used in public transportation. Pilotage Authorities apparently feel they need no longer be concerned about seaworthiness or the adequacy of life-saving or other equipment in pilot vessels, because all vessels must have a 'Certificate of Inspection' before they can operate (vide sec. 395 C.S.A.). The Department of Transport has expressed the opinion that the intent of sec. 364 C.S.A. is now automatically complied with and, hence, Pilotage Authorities need not license pilot vessels, despite the imperative provision of the Act (Ex. 1461(t)).

This attitude is not altogether correct, even from the practical point of view, quite apart from its illegality (in view of the imperative provision of sec. 364). The D.O.T. inspection requirement does no more than reduce the importance of the question because a Certificate of Inspection does not mean that a vessel is suitable for the specialized type of work required in pilot vessel service, including going alongside ships in all kinds of weather and sea. The certificate merely indicates that a vessel is seaworthy and suitable to be used for public transportation, but much more is required of a pilot vessel. An example of this situation is the privately-operated pilot vessels at Prince Rupert, whose suitability was raised before the Commission. The pilots contended that the vessels provided by the private contractor, Armour Salvage Company, were not suitable for pilot vessel service in the boarding area off Triple Island. They charged that the vessels were "old fish tugs" not

built for pilotage service, their decks were too close to the water and the seas washed over them at times, they were fitted with bulwarks over which the pilots had to jump when reaching for the Jacob's ladder to climb a ship's side, thus making boarding even more dangerous. On the other hand, the Department of Transport maintained that these vessels were suitable because they were seaworthy and complied with steamship inspection requirements, although these contained no special provisions for vessels intended to be used as pilot vessels.

In their evidence the Churchill pilots claimed that the tug, *W. N. Twolan* owned by the National Harbours Board and used as a pilot vessel at Churchill, is not suitable for embarking or disembarking pilots. The vessel was described as "a deep-sea tugboat built for multi-purposes". But it has too much superstructure for a pilot vessel, rides too high, rolls heavily in a moderate swell and has a flared bow which makes it difficult, and at times impossible, to manoeuvre alongside vessels. When there is a heavy swell the pilots are obliged to disembark from outbound vessels just before leaving the protection of the inner harbour. However, incoming vessels, which are boarded in the vicinity of the fairway buoy, have occasionally been obliged to wait for long periods until conditions allowed a pilot to embark. The National Harbours Board is aware of these difficulties and during the winter of 1965-66 the *W. N. Twolan* was placed in the Pictou Foundry shipyard for refit and extensive alterations. Nevertheless, the official stand of the Pilotage Authority in Ottawa has been that the tugboats employed as pilot vessels at Churchill are adequate, simply because they have met D.O.T. steamship inspection requirements, viz "This Certificate which is issued by a branch of the Department of Transport, is considered to be sufficient evidence of their suitability as a pilot boat and the Authority has never issued a pilot boat license" (Ex. 1471(1)).

It has also been established that the requirements for pilot vessel service vary from place to place, principally according to the amount of shelter available. For instance, a vessel which is perfect for this service off Quebec City is completely unsuitable at Les Escoumains. Again, the Saint John pilots rejected as unsuitable for operations in the heavy seas and swell that prevail off Saint John Harbour a type of pilot vessel which is considered suitable at Sydney, N.S., and is also being used satisfactorily off Les Escoumains. Therefore, when a vessel is to be used for pilot vessel service, specific requirements are dictated, first, by the type of work to be performed and, second, by the circumstances and conditions peculiar to the boarding area. These requirements are not fully considered during a regular steamship inspection which is applicable to all vessels. It is the responsibility of each Pilotage Authority to ensure that vessels employed as pilot vessels in its District meet specific requirements, first, by defining criteria in its regulations and, second, by not allowing any vessel to operate as a pilot vessel unless it has been duly approved and licensed.

The Commission was also informed that steamship inspection requirements are not mandatory for Government-owned vessels, although the authorities responsible usually conform voluntarily. This point has its significance because the Department of Transport provides the more important pilot vessel services, i.e., at St. John's, Nfld., Halifax, Sydney, Saint John, N.B., Les Escoumains, P.Q., Brothie Ledge and Sand Heads, B.C.; and the National Harbours Board is responsible at Churchill. However, the information given to the Commission is not correct. At present, steamship inspection is mandatory for Government-owned vessels. Sec. 16 of the Canada Shipping Act delegates to the Governor in Council the responsibility for passing legislation by regulation re the registration of "Government ships" (subsec. 2 (30)) as British ships and the applicability of the various provisions of the Act to such vessels. The latest regulations (P.C. 1966-1027 dated June 2, 1966) entitled "Registration of Government Ships' Regulations" do not list secs. 410 and 481 C.S.A., nor is sec. 364 C.S.A. among the sections of the Act that do not apply to Government vessels, with the result that Government-owned pilot vessels are subject to inspection requirements.

The Commission was further informed that steps were being taken in all Districts where the Minister is Pilotage Authority, including Montreal and Quebec, to "require all boats used for the transportation of pilots to receive licences for the coming [1967] season under Section 364 and that a prerequisite for the issue of such a licence will be compliance with safety standards set by the Steamship Inspection Division" (D.O.T. letter dated February 6, 1967, Ex. 1503).

When a Pilotage Authority is satisfied with a D.O.T. inspection certificate, it relies on the judgment and performance of a person or persons over whom it has no control. This, in addition to being an illegal and unauthorized delegation of power, indicates a serious misconception of responsibilities, especially when, by failing to make the necessary regulations, an Authority renders itself powerless to take any action if the vessels so certified are inadequate for their pilotage rôle.

4. INCOMPATIBILITY OF LICENSING FUNCTION. The third factor that has changed the situation is the incompatibility of the licensing function when pilot vessel service is directly or indirectly provided by a Pilotage Authority. When, as a result of abandoning the competitive system, only a single effective pilot vessel service was required, many Pilotage Authorities found that the most suitable way to reach this goal was to control pilot vessel service and, to this end, they purchased, maintained and operated pilot vessels. Their cost was considered an operating expense of the District and, therefore, was paid out of District revenues, i.e., licence fees and pilotage dues. This was the procedure followed by, *inter alia*, the Pilotage Authorities in Halifax and Sydney, until the Department of Transport assumed the responsibility for pilot vessels (vide C. 5, pp. 113-115). In the Newfound-

land Districts of Botwood, Port aux Basques and Humber Arm the Authorities still operate their own vessels (vide C. 8, p. 282). Logically enough, the By-laws of these Districts contain no regulations on the licensing of pilot vessels because their Pilotage Authorities have no intention of authorizing other pilot vessels to enter into competition, nor are they in a position to exercise the judicial function of licensing their own pilot vessels.

To all intents and purposes, the situation is the same where pilot vessel service is provided by the Department of Transport in Districts where the Minister is the Pilotage Authority. For instance, it was pointed out that it would be preposterous if the Minister as Pilotage Authority was obliged to approve and license the pilot vessels that he provides and operates as the Minister of Transport. While in theory and in law the two offices are quite distinct, in practice the distinction is not made and the terms "Minister" and "Pilotage Authority" are generally considered synonymous. It may not be realized that when the Department of Transport operates a pilot vessel service it is in the same position as any other operator *vis à vis* a Pilotage Authority. The responsibility for determining the criteria for pilot vessels in a given District rests solely with the Pilotage Authority, provided the requirements it imposes do not conflict with other legislation, e.g., the obligation to obtain a Certificate of Inspection. Pilotage Authorities may not require less than other legislation prescribes but they may require more, and in such a case the Department of Transport, like any other operator, is bound by their regulations.

COMMENTS

It is considered that the licensing requirements for pilot vessels should be retained with, however, some necessary adjustments to meet today's requirements, including:

- (a) Possession of a valid Certificate of Inspection issued by D.O.T. should be a statutory prerequisite for obtaining and holding a pilot vessel licence. Since this condition is applicable in all Districts, it should be contained in the Act and not left to Pilotage Authorities, which, experience has shown, often neglect to include the necessary provisions in their regulations and, therefore, might have to license unseaworthy vessels.
- (b) In order to ensure service of the highest quality, Pilotage Authorities should be authorized to limit by regulation the number of pilot vessel licences granted for a given boarding area and, if necessary, to grant a franchise to only one operator on the terms and conditions stipulated in the regulations.
- (c) If licences are issued to more than one operator, Pilotage Authorities should be authorized, in the interest of efficient service, to make regulations for distributing work among the operators, in which case, the pilots should be obliged to use the licensed pilot vessels as provided for in the regulations.

- (d) Pilotage Authorities should be authorized by regulations to limit the duration of licences, i.e., to grant term licences, so as to allow for periodical reassessment of the suitability of pilot vessels and also to permit additions that may be considered necessary to meet new needs.
- (e) The Act should include a *pro forma* licence which indicates, *inter alia*, the duration of the licence, the number and date of the applicable D.O.T. Certificate of Inspection and the regulations which must be observed for the duration of the licence.
- (f) If future legislation permits Pilotage Authorities to own and operate pilot vessels, they should also be subject to licensing but by an independent body, preferably a superior authority.

These recommendations are a great departure from the present legal situation, but they correspond to the practices which have developed as a result of the present needs of the service and are, in essence, followed in all Districts.

C. AUXILIARY POWERS

Auxiliary powers are those which, although they exist *per se*, are not part of the principal aim of a mandate but are given in addition to be exercised at the same time. Therefore, they must be defined in legislation. Since a Pilotage Authority is essentially a licensing authority, its regulation-making power is, in fact, one of its most important auxiliary powers. While Pilotage Authorities were not created to exercise the function of making regulations, once they were established the licensing function they exercised made them the logical bodies to be charged with responsibility for adjusting legislation to the peculiarities and needs of their Districts. This regulation-making power might well have been given elsewhere, e.g., the Governor in Council, the Minister of Transport, or Port Authorities.

There are two other auxiliary powers of great importance:

- (a) power to collect pilotage dues and, in that connection, to have any foreign ocean-going ship detained if indebted;
- (b) power to create and administer a pilot fund.

The power to collect pilotage dues has already been studied in chapter 6 (pp. 187 and ff.). This power meets a definite need and should be made a statutory rule applicable to all pilotage monies. However, some flexibility should be left by allowing each Pilotage Authority to provide otherwise by regulation if local circumstances are such that the rule would put the Authority to unnecessary trouble and expense.

The power to create and administer a pilot fund is also for the benefit of the pilots, i.e., the creation of a fund to provide them with financial assistance, when they or their families are in need (subsecs. 2(68), 329(m), 351(2),

and secs. 358, 375 C.S.A., and subsec. 319(l) 1934 C.S.A.). This power also might well have been given to another authority (as was done in the District of Quebec where it is exercised by the 1860 Pilot's Corporation which now exists for that purpose only) but it was normal to entrust it to the licensing authority which, because of its surveillance duty, is always in close contact with the pilots and knows their needs. (Pilot fund is the subject of Chapter 10.)

There are a number of other less important auxiliary powers, such as to act as arbitrator in disputes on pilotage matters between Masters, pilots and others (subsec. 329(k)), or between pilots over the right to pilotage dues in implied contracts (subsec. 351(1)(b)), or between a licensed pilot and an unlicensed pilot, when the latter is superseded, over his share of the dues (subsec. 355(2)); to grant *ad hoc* exemptions to foreign hospital ships or warships (subsec. 346(h)); to determine the non-availability of pilots and hence to allow a vessel to use an unlicensed pilot (subsec. 354(1)(a)).

D. ANCILLARY POWERS

Ancillary powers are the necessary accessories or adjuncts to other powers without which the latter could not be fully exercised. Normally ancillary powers are implied. Each specific power automatically includes whatever additional powers are necessary to exercise it, i.e., ancillary powers. They need not be expressed in legislation unless it is intended to derogate from what would have been the necessary inference. This principle is enunciated in subsec. 26(2) of the Interpretation Act:

“26. (2) Where power is given to a person, officer or functionary, to do or enforce the doing of any act or thing, all such powers shall be deemed to be also given as are necessary to enable the person, officer or functionary to do or enforce the doing of the act or thing.”

Since these powers are essentially subordinate, their nature and extent are qualified by the nature and limitations of the specific power on which they depend. Hence, they are automatically affected and modified by every restriction or amendment affecting the specific power. If a specific power is withdrawn from a Pilotage Authority, the ancillary powers automatically cease.

I. *Quasi-corporate powers*

To a limited extent Pilotage Authorities have been given the kind of ancillary powers that are normally enjoyed by a corporate body. These quasi-corporate powers are defined in part because they would not normally

be held by an officer of the Crown; they were necessary to confer on Pilotage Authorities the special status they required to preserve their autonomy and render it effective.

When the pertinent texts are studied it must be realized that they date from 1873 and have not been altered since. They were drafted as legislation was worded at that time and, therefore, must not be interpreted in the light of today's ideas, language and methods. Two Pilotage Authorities (the Halifax Pilot Commissioners and the Saint John Pilot Commissioners) were given corporate status by the 1873 Act but their functions, powers, responsibilities and duties were governed by the provisions applicable to all Pilotage Authorities. Thus, they were not in any different position to other Pilotage Authorities. It appears that corporate status was given these Pilotage Authorities simply because some of their members were appointed by the Government and others were elected by local authorities. On the other hand, all members of the other type of Pilotage Authority were Government appointees. In this way a mandate was given to an entity created by the Crown, i.e., to a corporation and not to a group of persons some of whom were not Crown appointees.

Since a Pilotage Authority is an officer of the Crown, it normally should be unable to do anything in its own name and should act only in the name of the Crown, but by virtue of its special ancillary powers it has limited power to enter into contracts, to own assets and to sue and be sued in its own name.

In order to ensure a Pilotage Authority's independence it was first necessary to guarantee appropriate sources of revenue. In the absence of any legislative provision to this end, the mandate contained in the statute would have been sufficient authority to seek the necessary money from public funds through estimates, but Parliament made this procedure unnecessary by making each Authority financially self-supporting. The necessary revenue is provided by special funds, created by legislation, called "public monies for a special purpose". Each Pilotage Authority is authorized to draw on the appropriate fund to pay the expenditures it requires to discharge its duties imposed by the Act. If a special procedure is prescribed, it must be followed. A Pilotage Authority is provided with two types of funds on which it may draw, i.e., the Pilotage Authority's general expense fund and the pilot fund. In addition it has other funds that come into its possession primarily for collection purposes only, i.e., dues for services rendered, various monies belonging to the Consolidated Revenue Fund, and monies belonging to third parties (vide C. 5).

The general expense fund, which is created by sec. 328 C.S.A., is composed of licence fees and certain pilotage dues. In case these are insufficient, the Pilotage Authority is given power of assessment over the pilots' earnings which, in fact, is an indirect power of assessment on shipping because the Pilotage Authority is empowered to fix the tariff to provide pilots with an adequate income after District expenses have been deducted.

Sec. 328 prescribes two conditions for the use of this fund:

- (a) expenditures must be for the “necessary expenses of conducting the pilotage business of the district”;
- (b) re procedure, the sanction of the Governor in Council is to be obtained.

It follows, therefore, that a Pilotage Authority, even with the Governor in Council’s approval, has no discretionary power over spending this fund. This money can not be given away gratuitously nor attributed to pay other than District expenses, e.g., it could not be used to pay expenses incurred by pilots in the performance of their duties or to pay a pension benefit.

The purpose of this fund is couched in very general terms which, at first sight, might be interpreted as authorizing a Pilotage Authority to “conduct the pilotage service”. It must be borne in mind that this is an ancillary power whose scope, despite the generality of its terms, is determined by the specific powers given to a Pilotage Authority. The Act gives no power to any Pilotage Authority to provide or to control the pilotage service.

The procedural requirement is merely a means of control imposed by legislation to prevent misuse of this fund and, presumably, to restrain the extraordinary power of assessment given to Pilotage Authorities. Similar controls are imposed on the expenditures of the various departments of Government by the Financial Administration Act. Being a statutory requirement, it is an essential prerequisite and non-compliance entails nullity of payment, which then amounts to mishandling public funds.

Sec. 328 has no application to the other funds that come into the hands of the Pilotage Authority. These funds must be disposed of as allocated in the Canada Shipping Act: pilotage dues must be paid over without delay to the pilot who earned them, after pilot vessel earnings and pilot fund contributions, if any, have been deducted; contributions so deducted, and any other monies received that belong to that fund, must be paid into the pilot fund; any monies allocated by statute, such as licence renewal fees referred to in subsec. 339(2) and monies for which no special attribution is made, must be remitted to the Consolidated Revenue Fund.

Nor does sec. 328 apply to the exercise of auxiliary power over the administration of a pilot fund. The power of effecting the necessary expenditures is covered by sec. 375 which authorizes a Pilotage Authority to pay out of the pilot fund: every expense properly incurred in the administration of the fund; benefits stipulated in the regulations, if any, passed under subsec. 329 (m) as they become due; benefits it may decide to give to retired pilots, or to the dependents of deceased pilots (sec. 358) in the absence of regulations; and, finally, such allowances as it may decide to make to any pilot who has had his licence cancelled by a Court of Formal Investigation after an “investigation of a marine casualty” (subsec. 375(c) and sec. 568). The approval of the Governor in Council or other special formality is not required for any of these payments.

II. Powers over contract and assets

Ancillary powers to enter into contracts, to own assets, to sue or to be sued must be authorized by a specific power, and their exercise is governed by whatever limitations, procedural or otherwise, affect the power on which they are dependent. For instance, the sanction of the Governor in Council is a prerequisite to the exercise of any ancillary power if it entails an expense falling under sec. 328, but not if it concerns the administration of a pilot fund.

The right to enter into contracts, to own property, to use and to be sued which arises out of the administration of pilotage is partly expressed, but mostly implied, in sec. 328 which provides how expenses incurred by a Pilotage Authority in conducting the pilotage affairs of his District are to be paid. This implies that the Authority is capable of incurring debts which are the result of contracts. Therefore, sec. 328 implies the right to make whatever contracts are necessary to discharge a Pilotage Authority's responsibilities, i.e., to purchase services or assets.

A Pilotage Authority has the right to employ the staff required for internal administration, the collection and handling of pilotage money, the drafting of regulations and the preparation of reports. When necessary, it may engage experts, such as legal counsel, physicians and experts in pilotage or navigation. When sec. 328 refers to "a secretary and treasurer", it merely gives an example of the rule enunciated in the final part of the section and names the most important single contract Pilotage Authorities have to make. A Pilotage Authority may also lease accommodation, and incur telephone, telegraph and other office expenses. Similarly, it may purchase and own whatever assets are necessary for its operations such as office equipment and stationery, and may even purchase a building for accommodation if circumstances either prevent leasing or make it preferable for the Authority to be the owner. However, all contracts must receive the approval of the Governor in Council because they always involve disbursements from the expense fund.

Because these powers are ancillary they automatically terminate when the purpose for which they were invoked has been achieved by the Authority in the discharge of its mandate. Contracts must then be terminated and surplus assets disposed of since the Pilotage Authority is no longer entitled to own them. Because these assets were paid for out of the expense fund, it would be logical to assume that they form part of that fund and that when they are no longer required they are liquidated and the proceeds returned to the general fund. However, as seen earlier, the Exchequer Court in *Himmelman v the King* (1946 Ex. C.R. 1), basing its opinion on the Consolidated Revenue and Audit Act of 1931, returned the finding that the pilots had no claim to such proceeds, despite the fact that the assets were acquired largely by assessments on their earnings, that these proceeds could not be returned to the Pilotage Authority expense fund because they were neither

licence fees nor pilotage dues (sec. 328), and that they ought to be deposited in trust or for a special purpose in the Consolidated Revenue Fund. However, it was considered they should be treated as if they were part of the Pilotage Authority's expense fund, i.e., to pay District general expenses. (In this case, the question of the power of the Pilotage Authority to own and operate pilot vessels was not a point at issue, but was taken for granted by both parties and by the Court.)

The Himmelman decision shows the consequences of passing new legislation of general application without ensuring there is no conflict with other legislation which it amends indirectly. This raises the question to what extent the system for handling pilotage funds (which has remained materially unchanged since the main provisions were included in the Act in 1873 and 1875) has been modified by subsequent general legislation governing public money. For instance, there is nothing in the Act which states who is responsible for the safekeeping of pilotage money. Secs. 328, 343, 349, 351, *et al*, C.S.A. imply that this responsibility rests with the Pilotage Authority. This must have been sufficiently clear when these provisions were introduced, but it is no longer so today because as seen earlier in chapter 5, the Financial Administration Act (1952 R.S.C. c. 116) applies to pilotage monies which come within the definition contained therein of "public monies for a special purpose". Subsec. 16(1) of this Act requires this public money to be deposited to the credit of the Receiver General of Canada and its expenditure supervised by the office of the Comptroller of the Treasury which will allow withdrawals if satisfied that expenditure is for a purpose specified in the applicable provision of the Canada Shipping Act and if the prescribed procedure has been followed.

These provisions of the Financial Administration Act not only are not followed, but are formally contradicted by the provisions of all Pilotage District By-laws (except Prince Edward Island District where no funds are handled by the Pilotage Authority) which provide that each Pilotage Authority keeps full control over all pilotage monies by depositing them in a bank of its choice in an account, referred to as the "pilotage fund" for the District concerned, from which it may draw at will, without formality. This practice and these By-laws, although approved by the Governor in Council, appear to be in complete contravention of the Financial Administration Act. On the other hand, they are consistent with the quasi-corporate status the Act has given Pilotage Authorities to ensure their independence and autonomy.

In future legislation this point ought to be clarified. It is believed that Pilotage Authorities should be allowed to continue to handle their funds, subject to examination by the Auditor General. This surveillance will become even more necessary if Pilotage Authorities incur substantially higher expenses as a result of increased responsibilities.

As far as Pilotage Authorities are concerned, pilotage is not a profit-making venture. They are not allowed to accumulate a surplus or incur a deficit. Unless a Pilotage Authority has assumed powers it does not possess, a surplus is not likely to occur under the system provided in Part VI. An Authority's own revenue which is applicable to the general expense fund should always be insufficient to meet its expenses. A surplus can not be accumulated unless the compulsory payment system is imposed on a large group of vessels which do not need pilotage services, because dues collected from vessels which did not take pilots and for which a special application could not be made under sec. 351 C.S.A. comprise the only substantial item of revenue for the expense fund. Such a situation should not be allowed to exist. Furthermore, a Pilotage Authority has no right to make any assessment on pilots' earnings unless there is a deficit in the expense fund. Sec. 328 authorizes the Authority to draw on the pilotage dues belonging to the pilots only when it is necessary to meet actual expenses.

Nor should a deficit be allowed to exist: accounts must be settled when they are due. However, if a substantial disbursement of capital funds becomes necessary, e.g., acquiring expensive items of office equipment and machines, or a building, there appears to be no objection to spreading the cost over a period of time so that it is equitably shared by all who will benefit. This method of payment, like any other expense, ought to be authorized by the Governor in Council under sec. 328. In view of the fact that sec. 328 applies only when obligations have actually been incurred, the opposite course, i.e., accumulating a reserve to replace assets, is not permissible.

Nevertheless, a Pilotage Authority is powerless to own pilot vessels or hire their complement, to employ staff for despatching pilots or to incur expenses connected with pooling the pilots' money, because existing legislation does not give Pilotage Authorities specific power to take such action. The control of the exercise of the pilot's profession and the operation of a pilot vessel service are not part of their mandate. Whenever a Pilotage Authority has assumed these powers it has created great confusion about title to ownership and responsibility for liabilities, e.g., the Halifax pilots and the New Westminster pilots considered themselves actual owners of pilot vessels through a sort of partnership administered for them by their Pilotage Authority. As stated earlier, when the pilot vessel *Camperdown* was lost, the Halifax temporary pilots sued for their share of the insurance. When the Department of Transport assumed responsibility for pilot vessel service at Sand Heads, the New Westminster pilots complained that they received no indemnity for the share of the cost they were forced to contribute by deductions from their earnings. In New Westminster, as in the other Districts where similar action was taken, the Department of Transport merely had the pilot vessels transferred by the Pilotage Authority to the ownership of the Minister, without reimbursing either the pilotage fund or the pilots, because

it was felt that the vessels did not belong to the pilots but to the Pilotage Authority, as agent for the Crown, although only pilotage money had been used to purchase them. By this process public assets owned for a special purpose became merely Crown assets.

A Pilotage Authority incurs no expense in those Districts where the Minister is the Pilotage Authority, because everything is paid for by the Department of Transport. In the other Districts (except Prince Edward Island where the Pilotage Authority has no operating costs), the various Pilotage Authorities have taken advantage of their financial powers and, in general, have exceeded them. This is especially true of the New Westminster Pilotage Authority which has always been very active. *Inter alia*, it has hired clerical staff and crews to man vessels owned by its pilots, purchased wharves and land, borrowed money from the bank, rented premises and land and leased a wharf to third parties (vide New Westminster Pilotage District). Aside from the fact that most of these contracts and expenditures were ultra vires, they were also all illegal (except the recent hiring of the Secretary and Treasurer), because the approval of the Governor in Council was never obtained, or even sought.

When a Pilotage Authority deals with a pilot fund it derives its powers from subsecs. 319(l), 1934 C.S.A. and 329(m) C.S.A. and By-laws made thereunder, and from secs. 358 and 375 C.S.A. which enumerate the types of payment a Pilotage Authority may make out of a pilot fund. Since a pilot fund is by nature an emergency fund to aid pilots and their families, it is unlikely to be exhausted every year, and a reserve should be accumulated to meet possible needs. The power to create and administer such a fund automatically carries the ancillary power to invest any unexpended capital, and the Pilotage Authority is required to act as trustee. The sanction of the Governor in Council is not necessary for any of these expenditures, payments or investments. Sec. 328 does not apply to pilot funds because expenses connected with them are not incurred while operating the pilotage service but in the exercise of the auxiliary power of administering funds as such. Moreover, the sections dealing with pilot funds contain no provision for controlling expenditures.

III. Power to sue and be sued

There remains the question whether a Pilotage Authority as such can sue or be sued. Here again, a distinction should be made between court proceedings arising from the administration of a pilot fund and those from other causes. Since any court proceedings imply a possible disbursement of money, either because the outcome is unfavourable to the Pilotage Authority or because the debtor turns out to be insolvent, and also because there are always incidental expenses that can not be recovered, the provisions of sec. 328 apply to all cases where the Authority may be sued, and which do not

arise out of the administration of a pilot fund. Therefore, prior approval of the Governor in Council is necessary each time before proceedings are taken.

Any power without effective means to exercise it is, in fact, a denied power; recourse to the courts is the ultimate recognition of its existence. The power of a Pilotage Authority to institute civil proceedings in certain cases is recognized by the Act. Sec. 343 makes the Pilotage Authority the creditor for pilotage dues whenever they are made payable to it, either by the Act, e.g., sec. 348 and subsec. 350(2) or regulations passed under subsec. 329(h). In the case of pilotage dues owed to the Pilotage Authority pursuant to sec. 348 and subsec. 350(2) and the quasi-fine a vessel is liable to pay under subsec. 350(1), the stipulation of subsec. 351(1)(a) implies that the recovery expenses are incurred by the Pilotage Authority since it is authorized therein to reimburse itself before remitting the dues to the pilot entitled to receive them, or to the pilot fund, as the case may be.

The power to enforce such payment, i.e., to sue in justice for recovery, is a power ancillary to a Pilotage Authority's right and duty to collect pilotage dues as a debt owed to it. Furthermore, it is a necessary ancillary power to the responsibility for licensing and the surveillance duty this implies, that the Pilotage Authority should be authorized to institute penal proceedings when a pilot commits a statutory offence or violates a regulation. If penalties are provided in disciplinary regulations, the last part of subsec. 329(g) authorizes the Pilotage Authority to act as plaintiff in recovery proceedings instituted pursuant to sec. 709 (*vide* C. 9).

Since Pilotage Authorities have power to enter into contracts and to own assets in their own name, pursuant to the ancillary power principle they should have power to sue in their own name for the protection of contractual rights and properties.

However, the right to be sued is not completely clear, in that there is no procedure provided for obtaining the Governor in Council's sanction if a Pilotage Authority refuses to obtain it when the issue of the proceedings implies a disbursement from the Pilotage Authority's expense fund. There is, however, no problem when the claim concerns the pilot fund: the costs of such a case are payable without formality as part of the administrative expenses of the pilot fund authorized by subsec. 375(a) C.S.A.

When the object of a claim is the recovery of damages arising from the wrong-doing of a Pilotage Authority or its servants, the plaintiff has a claim against the Crown (subject to the limitations imposed by pertinent legislation) for damages caused by Crown officers, in addition to the claim that exists against individual members of the Pilotage Authority or the servant concerned. Such an action can not be directed against the Pilotage Authority as a truly corporate body, because it owns no assets of its own, but only for specified purposes, none of which is applicable to the payment of damages caused by the Pilotage Authority or for which it could be responsible. To pay such damages out of the general expense fund under sec. 328 would amount

to making the pilots pay for the wrong-doing of the Authority since most of the fund is provided by assessments on their earnings. If a judgment on such a claim were to be obtained there would be no fund out of which the Pilotage Authority could pay the award and the costs. It appears that in this event recourse lies against the Crown for its vicarious liability for the wrong-doing of one of its agents. Conversely, when the object of a claim is the recovery of money that forms part of any of the various funds administered by the Pilotage Authority, the plaintiff has no claim against the Crown because the Crown has no authority to effect any disbursement from these funds. A judgment rendered against it could not be enforced. This claim lies against the trustee of such funds, i.e., the Pilotage Authority.

During the last decade, no recovery proceedings were taken either for pilotage dues or for penalties and no charges were laid before any penal tribunal with respect to pilotage offences (Ex. 1466(a)).

In a few cases, however, a sum of money has been claimed against a Pilotage Authority. The procedure normally followed was to direct proceedings against the Crown. Two such cases were reported. In both, the action was dismissed, not because the proceedings had been directed against the wrong defendant (the question does not appear to have been raised), but on the merits of the case. In the first case, *Gariépy v the King* (1940, 2 D.L.R. 12), Pilot Gariépy's claim for damages resulting from the abuse of power of the Pilotage Authority representative, the local Quebec Supervisor, was denied because of contemporaneous legislation regarding Crown liabilities. In the second case, *Himmelman et al. v the King* (1946 Ex. C.R. 1) referred to earlier, the Court found that the plaintiffs had no claim to the insurance paid the Crown following the sinking of the pilot vessel *Camperdown*.

However, in three other reported cases, the suits were directed against the Pilotage Authority. The question whether the right defendant had been assigned was not raised. In two of these cases, the Pilotage Authority had a corporate status granted by the provisions of the Canada Shipping Act existing at the time, but this seems to have made no material difference in that the provisions of what is now sec. 328 C.S.A. applied equally to them, and from the financial point of view these corporations were governed by the same provisions as any other Pilotage Authority. In the case of *Spears v the Saint John Pilot Commissioners* (1910, 39 N.B.R. 495 (C.A.)), Pilot Spears sued to recover pilotage dues collected by the Pilotage Authority from vessels for pilotage services he had rendered. The claim was denied on its merits. On account of the compulsory payment system, the dues were owed by the vessel whether or not the plaintiff had a valid claim. It was found that the plaintiff had no claim to them because he had not proceeded as prescribed in the By-law. These vessels had not been spoken to, reached and boarded on their incoming voyage by a pilot from a licensed pilot vessel (at that time, the earnings of the Saint John pilots were paid to companies formed to operate

licensed pilot vessels). Except for the court costs that the Pilotage Authority might have been obliged to pay if the plaintiff had been successful, this case did not come under sec. 328 because the money the plaintiff was seeking was not part of the Pilotage Authority's expense fund but of the pilotage dues for services rendered, which normally belong to the pilot and are collected for him by the Pilotage Authority.

The second case, *Smith v Halifax Commissioners* (1917, 35 D.L.R. 765), concerns a claim directed against the Pilotage Authority in its two capacities, both as licensing authority and as trustee of the pilot fund. The plaintiff sought recovery of the licence fees he had paid for his first licence and for its subsequent renewal. These formed part of the Pilotage Authority's general expense fund. He also sought the aggregate amount of his contribution to the pilot fund during the preceding 35 years. When he became incapacitated by old age and infirmity in 1914, the Halifax Authority denied his claim for a pension on the ground that St. Marguerite's Bay, where the plaintiff acted as pilot, was not within the Halifax District, while, on the other hand, refusing to reimburse what had therefore been illegally collected. The first court and the Court of Appeal found the claim founded and the Pilotage Authority was ordered to reimburse the plaintiff.

In the third case, in 1948, Canada Steamship Lines Ltd. sued the Minister of Transport, in his capacity as Pilotage Authority for the District of Montreal, for the recovery of pilotage dues in the amount of \$540 which the plaintiff had paid under protest, claiming that the ship concerned was exempt. The Superior Court *proprio motu* stated its lack of jurisdiction *ratione materiae* because the litigation pertained to a Federal Act of a public character which came under the jurisdiction of the Exchequer Court. The decision was not appealed and it does not appear that the case was pursued before the Exchequer Court (1948 C.S. 378 *Canada Steamship Lines v Hon. Lionel Chevrier and Attorney General of Canada*).

COMMENTS

It is considered that the question of ancillary powers leaves much to be desired, especially in view of the status of exception they create. Lack of clarity may cause unnecessary litigation. In addition to the unnecessary expense a plaintiff with a valid claim may incur, he runs the risk of losing his right because it has become time-barred and he may be too late to take fresh proceedings if the first case is dismissed on a question of procedure.

As indicated above, the right of Pilotage Authorities to administer all pilotage money should be clearly recognized in order to legalize the practice that has been followed for many years because it meets a definite service need and is required for the efficient operation of decentralized units which the Pilotage Authorities are, and should continue to be. However, this right should be subject to supervision by the Auditor General of Canada.

Particularly if the powers of the Pilotage Authorities are extended, it is considered that they should be specifically granted corporate status with all the powers that pertain to corporations as defined in the Interpretation Act (vide P. 338) modified, if necessary, to fulfill any responsibilities. This action would, in effect, grant each Pilotage Authority all the ancillary powers it requires and would establish its autonomy without ambiguity.

Chapter 9

LICENSED PILOTS: SAFETY AND DISCIPLINE

PREAMBLE

Earlier studies have shown that pilotage is the ultimate means to achieve safety of navigation. Organized pilotage provides shipping with the services of expert qualified navigators in specified waters that are generally confined and congested by traffic. The value of pilotage as a safety factor is in direct relation to the degree of competence and the qualifications possessed by each pilot throughout the duration of his licence. It is not sufficient for a pilot to meet the prescribed minimum when he is licensed: his qualifications must be maintained and improved where possible, and he must continue to meet his responsibilities as a licensed pilot. It is important today, and will be even more so in the foreseeable future, for pilots to keep *au fait* with the increasing size of ships and new methods of handling and navigating.

Hence a pilotage system based on licensing presupposes three powers: to oversee, to enforce discipline and to reappraise. Unless the limits of these three functions are clearly understood, the service will suffer and vessels will be endangered.

These functions need not be exercised (and ideally should not be exercised) by the same person or authority and any one of them can be exercised by more than one person or authority, either concurrently or possessing exclusive jurisdiction over part of the function.

The extent of surveillance, disciplinary and reappraisal powers varies according to the importance to the public of a pilotage service and the standard of qualifications of its pilots.

In pilotage legislation based on the free enterprise system, where pilotage is considered merely a service for the convenience of shipping, it is to be expected that surveillance and remedial powers will be limited and will be exercised only in particularly serious cases. The true free enterprise system contemplated in the present Act contains an automatic selection process: a pilot's performance and reputation determine whether he makes a living by piloting or chooses other employment. When a Master or agent selects a pilot he is responsible for his choice and must suffer the consequences if he

lacks the necessary information and does not take due precautions. Under such a system the Crown bears no responsibility for the faults of a pilot but only for damages that can be directly attributed to a Pilotage Authority's wrong-doing. In that context it was normal to limit the surveillance function of Pilotage Authorities and to give them no extraordinary powers of investigation. There was no objection to sharing this function with the Minister of Transport. It was also logical that Pilotage Authorities had limited power to suspend or withdraw a pilot's licence, with the result that preventive suspension was considered most exceptional.

The limited powers given to Pilotage Authorities in Part VI are, however, completely inadequate in today's context, as is the scheme of organization to which they belong. Pilotage Authorities, following a process that permitted the establishment, in spite of the law, of a completely different pilotage organization, generally through *ultra vires* regulations but often without regulations of any kind, tried to give themselves the surveillance and control powers which were denied by the Act but were necessary for the efficient discharge of their considerably increased responsibilities. But here they met increasing opposition because the exercise of these powers clashes with the interests, as well as the statutory rights, of the pilots involved, so much so that now they are, in practice, deprived of the extra-statutory surveillance and control powers they tried to assume.

Other factors contributed to confuse the situation further. Gradually the terms Minister of Transport and Pilotage Authority came to be considered synonymous and the administration of all the larger Districts was centralized in Ottawa.

As a result, Pilotage Authorities now hold only the limited surveillance and remedial powers given to them by the Act but, at the same time, they are forced by circumstances to assume duties and responsibilities over which they can exercise no effective control. The total effect is that the Canada Shipping Act is not observed, most of the regulations in District By-laws are *ultra vires* and the Pilotage Authorities no longer control the pilots' conduct. In the ensuing confusion some of the most serious cases of misconduct have remained unpunished and incompetent pilots are allowed to retain their licence with serious consequences for the safety of navigation.

Under the new exigencies of the pilotage service, the Pilotage Authorities have assumed responsibility for a fully controlled service (*vide* C.4, pp. 77 and ff. for details) with the result that the free exercise of the pilot's profession, competition for ships and the right of Masters to select their pilots have all disappeared. Masters who require a pilot are now obliged to accept the pilot assigned to them by the *tour de rôle* system which shares the workload equitably among all the licensed pilots. One of the consequences of these basic changes is that by assuming the right to assign pilots to ships without Masters having any choice in the matter, the Pilotage Authorities

have undertaken (perhaps unwillingly), to guarantee the qualifications, fitness and reliability of the pilots. In addition, the Pilotage Authority has superseded the pilot as a party to the pilotage contract by contracting for the services of its licensed pilots who, to all intents and purposes, have become its servants with the added responsibilities this entails.

The principles enunciated in this chapter apply *mutatis mutandis* to all other licence-holders. However, at present the legislative and factual situations differ materially in that there is no statutory provision dealing with the reappraisal function nor with disciplinary powers over the holders of pilotage certificates as opposed to pilots' licences (vide C.8, p. 306). Formerly, the Act contained a section giving authority to withdraw pilotage certificates for drunkenness, misconduct and incompetency (sec. 472, 1927 C.S.A.), and listed some statutory offences concerning certificate-holders (secs. 518 and 520, 1927 C.S.A.) but these provisions, together with all others dealing with pilotage certificates, were deleted and the whole question of pilotage certificates was made a subject-matter of the regulation-making powers of the Pilotage Authorities, *inter alia*, under subsec. 329(f) C.S.A. to make regulations establishing the rules of conduct and discipline which meet the needs of each District. These changes notwithstanding, no advantage was taken by Pilotage Authorities of their regulation-making power for this purpose. If the future pilotage system contemplates making greater use of pilotage certificates, all basic rules which apply generally to the conduct of certificate-holders should be reinstated as statutory provisions. The same remarks apply to pilot vessel licences. Even in those Districts where there is some semblance of regulations regarding licensing, none exists regarding discipline or the power to withdraw such licences.

1. SURVEILLANCE FUNCTION

All parties concerned with an enterprise have the right of surveillance but when public interest is involved designated officers of the Crown must bear this responsibility. Hence, each Pilotage Authority must oversee its pilots to ensure that they fulfil their duties and remain qualified, while at the same time taking special care that the Canada Shipping Act and the pilotage regulations are observed both by the pilots and others. This surveillance power is implied by the existence of a code of service discipline and by the right to reappraise, if and when required, as an inherent function of licensing. The fact that this surveillance duty is not specifically expressed in legislation is often used as an excuse not to act. For instance, a former Supervisor in the Quebec District adopted the policy of never acting unless he received a written complaint. This seldom happened. Obviously this attitude resulted from either a misconception of his functions and responsibilities or inability to perform his duties and, therefore, indicated his unsuitability

for the office. Early pilotage legislation made it a duty on the part of the Superintendent of Pilots to supervise the activities of the pilots and made it a statutory offence for him not to prosecute any failure or misbehaviour that came to his knowledge.

In the Quebec Trinity House Act a clear distinction was made between surveillance duty and judicial and quasi-judicial functions. While the Superintendent of Pilots was *ex-officio* a Trinity House Warden, the Act provided that when the Corporation sat as a pilotage tribunal he could not be a member thereof and that his function in such cases was to serve as informant and prosecutor. As will be discussed later, while the 1873 Pilotage Act retained by way of exception the special organizations of the Quebec and Montreal Districts, it provided a simplified system for the other Districts where public interest was much less involved. Judicial power over disciplinary cases came under the jurisdiction of the regular penal tribunals whose sentencing powers were limited to imposing fines and terms of imprisonment. The right to deal with a pilot's licence by way of suspension or withdrawal was made a function of the reappraisal power of each Pilotage Authority and the Act specifically defined the few cases where such power could be exercised. Responsibility for surveillance was not laid down in the Act, no doubt because it was considered implied in the mandate of any publicly appointed licensing authority. (Specific provisions in this regard are necessary only when it is intended to derogate from this principle as was done in the Trinity House Act). This scheme of organization has not been materially changed since 1873, except that the Quebec and Montreal organizations were made to conform to the prevailing system and each Pilotage Authority's powers of surveillance and reappraisal were substantially diminished when in 1904 (4 Ed. VII c. 37) some powers were assumed by the Minister of Transport acting through the administrative courts under the provisions of the legislation now contained in Part VIII C.S.A.

The power of surveillance is essentially relative. It exists as a function of the limited remedies that are authorized by the Act. It also forms part of the assistance that must be provided to other authorities who are empowered to take specific remedial action, e.g., the Minister of Transport regarding safety of navigation under Part VIII of the Act, and the Minister of Justice and Port Authorities in the prosecution of pilotage offences or offences relating to pilotage.

The efficiency of the surveillance function is further limited by the means and powers placed at a Pilotage Authority's disposal, the scope of which will vary according to the importance given by the Act to pilotage as a service for the public.

The surveillance function may be divided in two phases designated here as

- (a) discovery,
- (b) initiating remedial action.

DISCOVERY

The discovery phase is fact-finding. It is a prerequisite to the second phase because to initiate any remedial action properly, the attention of a Pilotage Authority has

- (a) first, to be alerted to a situation or an occurrence that falls within its surveillance jurisdiction (i.e., information);
- (b) second, to be sufficiently acquainted with the pertinent facts, which, unless they are self-evident, are obtained by making the necessary enquiries (i.e., investigation).

MEANS OF INFORMATION

Although the powers of a Pilotage Authority are very limited under Part VI, it has certain means of information at its disposal.

The first means of information comes from complaints by third parties, mostly shipmasters and agents. It is the right of any aggrieved party to lodge a complaint. However shipmasters and agents are often reluctant to make adverse reports against pilots and do so only when the situation is too serious for them to remain silent, or because it is in their interest to complain. It appears that many blameworthy instances remain unreported because the shipmaster or the agent does not wish to become involved, or for fear of some sort of retaliation from the pilots as a group.

As demonstrated by typical instances cited later (under Pilotage District of Quebec—*Discipline*), the Pilotage Authority and its officers react to such complaints with deplorable inactivity and when a belated investigation is carried out only incomplete evidence, insufficient to support any corrective action, is available. For instance, no routine is set up nor effort made to have the condition of a pilot, reported impaired by alcohol, verified without delay while it is still detectable, by persons not belonging to the ship and by a physician. Such a case, therefore, depends only on the testimony of those on board, which means possible delay for the ship. It is no wonder that under these circumstances Masters and agents refrain from making reports which involve them in costly delay, trouble and ill feeling and, more often than not, produce no useful result.

If considered desirable, such reports can be encouraged, e.g., by urging Masters to report without delay any unusual behaviour by pilots using the quickest means available—radiotelephone, wireless or land telephone—and, when circumstances warrant, by initiating an immediate investigation.

At one time, in what is now the Quebec District, the cooperation of shipmasters was made a requirement in that they had to file a report on the pilot's performance after each trip (1790, 30 Geo. VI c. 1). This feature was not retained in pilotage legislation after Confederation and, at present, Masters are not even invited to make their comments when they sign source forms (Ex. 556). It is true that there is a blank space on the form entitled "Remarks" but no mention is made that it may be used by Masters for that purpose and, in fact, the space is used solely by pilots to give particulars of any unusual occurrences en route. It is considered that by statute all source forms should provide a space "Master's remarks", and that the Act should also state that a Master's failure to report immediately to the Pilotage Authority by radiotelephone or wireless any misbehaviour or incapacity on the part of a pilot and to record such report on the source form would bar the ship from any civil claim or defence in litigation with the pilot, the Authority or the Crown, based on the pilot's alleged impairment to which it would otherwise be entitled.

A second means of information can be provided by anyone involved in the process of providing pilotage service, i.e., pilots, complements of pilot vessels and the Pilotage Authority's officers and employees, especially despatchers.

As a rule pilots do not report a fellow pilot unless there is rivalry between them, such as existed during free competition when disputes among pilots were common occurrences, and during the special service system which created discontent among pilots. Under the existing controlled system a pilot has little incentive to report a colleague for such action requires more than a common sense of professional responsibility. This attitude is not peculiar to pilots but is found in all professions including law and medicine, e.g., a lawyer very seldom reports a fellow lawyer unless he is the aggrieved party.

Masters and crews of pilot vessels are unlikely to report a pilot because their personal interest is to remain uninvolved, even though on most occasions it is only through them that a Pilotage Authority can determine whether pilots are physically fit. There is a requirement for a specific statutory provision carrying a penalty of a fine, for failure to report serious cases, e.g., drunkenness, drinking alcoholic beverages while about to proceed to duty and obvious physical unfitness.

Lacking effective power, the immediate local representative of the Pilotage Authority in Districts where the Minister is the Pilotage Authority, i.e., the District Superintendent (or Supervisor) has identified himself more with the pilots with whom he works than with the Pilotage Authority. In those Districts where there were disputes between third parties and pilots it was apparent that, in general, the local Superintendent was clearly biased in favour of the pilots.

Now that the Pilotage Authorities of the larger Districts have undertaken to control and provide pilotage services the District Superintendents do not have the time to attend personally to despatching and hence this clerical work is delegated to clerks who are guided by standing orders and Superintendent's instructions. At the same time these despatchers are supposed to exercise surveillance but, despite this obligation and duty, the record shows that they seldom make an adverse report on a pilot. It appears that they derive insufficient authority from their position and are afraid of losing their employment.

Evidence to this effect was found in the Quebec District where the Supervisor requested that all reports be made in writing, the expression "on reasonable grounds" in subsecs. 19(3) and (4) of the Quebec By-law being limitatively interpreted by him as meaning a written complaint. A former Quebec Supervisor stated that when he took office he first acted on verbal information but when he found this caused him trouble he made it a point to require complaints in writing, adding that if this was not furnished he would not take any action. This attitude shows a lack of comprehension of a Supervisor's duty and responsibilities.

Normally, a pilot proceeding on duty calls at the pilotage office only if he has to use a pilot vessel and even then, if he has received his orders in advance, he may proceed to the pilot vessel directly. Formerly, some By-laws required the pilots to call at the pilot office before proceeding to an assignment but, possibly in order to improve the pilots' working conditions, this is no longer required anywhere. If a pilot calls at the office the clerk has an opportunity to see him. According to the provision of the By-law, whenever a pilot is suspected of being under the influence of liquor he is to be stopped and taken off the list and when the Supervisor is informed by the clerk that such action has been taken he should carry out an investigation and report to the Authority.

It was, however, stated that the requirement of the By-law is deliberately not followed, that the despatchers do not report these cases to the Superintendent unless there is an abuse on the part of the pilot. Generally, when a despatcher realizes that a pilot may not be fit to proceed, he suggests the pilot change turns. The pilot usually agrees, the case is not reported to the Superintendent and no further action is taken, but, if the pilot refuses, the clerk has no alternative but to report the matter.

A later Quebec Supervisor stated that his instructions were for the clerk on duty to be on the lookout for violations and the clerks were told verbally to remove from the list any pilot who did not appear fit to proceed.

Despite these instructions, however, he added that during his ten years in office no pilot, as far as he knew, was ever prevented by the clerks from embarking because of alcohol.

It was intimated that the despatchers adopt that attitude because they fear retaliation. This is reflected in the case of pilot No. 70 (vide Pilotage District of Quebec—*Discipline*). During the Advisory Committee's hearing the despatcher gave one version which left no doubt as to the condition of the pilot but many months later, when an investigation was held under sec. 579 Canada Shipping Act, he changed his testimony. It was suggested that he was induced to do so by outside pressure because, after he appeared before the Advisory Committee, he was persecuted by some of the pilots.

In this case, the Commissioner who later investigated under sec. 579 remarked in his report:

"I am impressed by the responsibility borne by the despatcher in assigning pilots to ships particularly in cases where some urgency is attached to the situation. He may be all on his own and probably subject to the influence of others. I could not escape the conviction that Mr. . . . [despatcher's name] felt himself to be in a very embarrassing situation.

I feel, however, that a sense of this responsibility should be urged upon him and all despatchers and in the interests of the pilotage service they should not hesitate to refuse to assign a pilot for duty if they have any doubt about his fitness for duty. Nor should they feel that it will be subsequently incumbent upon them to prove drunkenness.

I should not want him to regard the outcome of this case as an indication that he or any other despatcher is not authorized to decline to send a pilot on board a ship if a pilot is, in his opinion, in no condition to carry out his assignment".

Similar fears were expressed by other despatchers both to the local Supervisor and to the Superintendent of Pilotage in D.O.T. Captain Slocombe added that the despatchers "are very low paid people and they stand in awe, you might say, of the pilots generally speaking. They feel that the pilots can make or break them". He added that the pilots are the offenders in this regard although only some of them are to blame.

The gravity of the situation may be compounded in the Quebec District by the fact that taking a pilot off the list is considered a sort of disciplinary measure and, in fact, has occasionally been used as such when suspended pilots were prevented from making up the turns they had lost (although nowhere in the By-law or in the Despatching Rules is there any authority for such action). Mr. J. A. Maheux a former acting Supervisor for the Quebec District, stated that taking a pilot off the list is considered a disciplinary measure because the pilot loses turns and earnings, although no charge is laid and there was neither trial nor conviction.

Mr. Maheux pointed out one such instance involving pilot No. 16 who missed his turn July 21, 1962. This was a case of drunkenness that had been reported by a clerk. When the pilot was reinstated, he had lost six trips and

he was prevented from making them up; no charge was laid and the licence was not withdrawn as required by the By-law. The entry in the *Establishment Book* for July 27, 1962, read as follows:

“Placed in turn with the average, lost six trips.”

Pilotage Authorities have other means of control at their disposal. Subsec. 329(f) C.S.A. gives them the power to make regulations “for ensuring their [the pilots] good conduct on board and ashore and constant attendance to and effectual performance of their duty on board and on shore . . .” and subsec. 329(j) to make regulations providing for the premature retirement of pilots on the ground of physical or mental incapacity. It is under the authority of these subsections that District By-laws include provisions requiring the pilots:

- (a) to report verbally immediately and in writing as soon as possible thereafter “on the form provided for that purpose” any shipping casualty (sec. 551) or incident in which the ship they were piloting was involved;
- (b) to report similarly when “any violation of the law on the part of other vessels is observed” (in some District By-laws the wording is “violation of the law or regulations on the part of other vessels . . .”);
- (c) to report, as soon as noticed, any physical or mental impairment;
- (d) to submit to periodical eyesight and hearing examinations.

With respect to requirement (b), the By-laws are not clear because they do not state to which legislation reference is made. If imperative provisions are to be effective they must be clear, unambiguous and *ad rem*. A further weakness is the “form provided” for the purpose of reporting does not exist; the only one available at present relates to shipping casualties and incidents (requirement (a)).

These limited means of obtaining information are insufficient to support a controlled pilotage service with all its attendant responsibilities.

POWERS OF INVESTIGATION

When information has been received (unless the case is self-evident), it becomes the Pilotage Authority’s responsibility to hold or to initiate an investigation warranted by the situation.

There are two types of enquiry. The first is a fact-finding, also called administrative, investigation to enable an administrative authority to decide with full knowledge what future course of action is to be taken. In this type of enquiry, no person’s rights can be finally affected; it is a complete process in itself. The second type is an enquiry, carried out by a tribunal, as an integral part of reaching a judicial decision. It establishes the evidence on which

a judgment affecting the rights of the parties involved is rendered and, since it forms part of a trial or a quasi-trial, the rules governing it are essentially different from those which obtain in the first type of enquiry. In pilotage matters the second type of enquiry is an integral part of exercising the licensing function, i.e., whether a pilot's qualifications are being appraised or reappraised in connection with his licence and also, during a trial, for a pilotage offence. It is not part of the surveillance function but of both the licensing and judicial function.

The duty of surveillance implies the right to hold investigations. A prerequisite to taking corrective action is full knowledge of all pertinent facts. Here again, the scope and importance of powers to investigate are proportional to the scope and importance of the surveillance function. Therefore, as is to be expected with the type of organization provided in Part VI, investigatory powers are very limited. Experience has shown that they are inadequate for the additional responsibilities assumed by Pilotage Authorities on account of present day requirements.

Fact-finding investigations may be divided into two groups depending upon the powers that are, or may be, exercised:

- (a) informal investigations where information can only be obtained if volunteered;
- (b) judicial type investigations, normally referred to as courts of enquiry, where the presiding officer possesses the powers of investigation that normally belong to a court of justice, to obtain all required information.

(a) Informal and formal investigations

No statutory provision is required to empower a Pilotage Authority to hold informal investigations because knowledge of the facts is part of the process of decision-making. However, specific provisions are required to authorize holding judicial enquiries because these powers infringe the basic freedom of individuals and are, therefore, powers of a very exceptional character which should be granted only when superior interests are at stake. In a systematization where pilotage is considered merely a service provided for the convenience of shipping, it was to be expected that such extraordinary powers of investigation would not be granted. Under the present legislation the safety of navigation is a responsibility of the Minister of Transport, but even his right to have a judicial enquiry held merely to establish facts has been limited by law to only the most serious cases affecting safety, i.e., shipping casualties. This aspect will be studied later.

Therefore, a Pilotage Authority possesses neither the powers nor the means to obtain complete information and must be satisfied with what it can discover by itself, in addition to whatever information is volunteered. It has

no power to compel the attendance of witnesses or the production of documents, to enter premises, to board ships, to take evidence under oath, or to afford witnesses protection. All these are powers that are normally given whenever Parliament considers it necessary, in the public interest, to hold a full enquiry. It is pertinent to note that even the power to take evidence under oath, formerly possessed by Pilotage Authorities in sec. 494 of 1927 C.S.A., was omitted in the 1934 Act. This section read as follows:

“The Pilotage Authority of any district shall, in all cases of inquiry or investigation made by them under this Part, or under any other Act or law, have full power to examine any person appearing before them to give evidence in such a case on oath; and such oath may be administered by any member of such Pilotage Authority present at such inquiry or investigation.”

The limited powers of investigation of a Pilotage Authority are in sharp contrast to the usual procedure followed by Parliament in the Canada Shipping Act whenever it wished to provide special powers of enquiry. Without exception, these powers are spelled out at length, e.g., the person or persons appointed by the Minister to investigate shipping accidents “may summon witnesses and compel their attendance by the same process as courts of justice, and may administer oaths and examine witnesses touching the cause of such accident...” (subsec. 552(2) C.S.A.); full powers are given by sec. 554 to the person appointed to investigate a wreck; the special powers of enquiry of the officer or person appointed to hold a preliminary enquiry in a shipping casualty are fully stated in sec. 556, i.e., to enter premises, board vessels, compel the attendance of witnesses, administer oaths, require and enforce the production of books, papers or documents.

The absence of such provisions in Part VI, or elsewhere in the Canada Shipping Act, regarding the investigations that may be carried out by Pilotage Authorities, and the fact that the power to take evidence under oath was withdrawn in 1934, can only mean that Parliament intended that Pilotage Authorities should have none of these powers. Furthermore, since the exercise of these special powers of investigation is an infringement on the basic rights of freedom of individuals, it can not be surmised that they have been granted by inference, on the ground that they are necessary attributes of a Pilotage Authority's responsibility for surveillance.

There is only one provision in the Act whose wording is wide enough to apply to all types of enquiries, viz. subsec. 329(f), but the context to which it refers restricts its application to the trial type of enquiry. It reads as follows:

- “ . . . every pilotage authority shall . . . have the power . . . to
- (f) make regulations . . . for the holding of enquiries either before the pilotage authority or any other person into any matters dealt with in this Part . . . ”.

Therefore, this subsection merely empowers every Pilotage Authority to prescribe by regulation rules of procedure for carrying out those investigations and enquiries that it is authorized to hold under the Act, i.e., adjusting pilotage disputes (subsec. 329(k)), settling claims by pilots for pilotage dues in the circumstances of secs. 348, 349 and 350 (351(1)), granting licences and reappraising the qualifications of pilots. The By-laws of various Districts contain a provision whereby in cases of impairment, or alleged impairment, due to intoxicating liquor or narcotic drugs, Superintendents are required to "make a full investigation into the matter and submit a report thereof to the Authority" (Quebec By-law, subsecs. 19(3) and (4)), but there is no definition of the procedure to be followed and the form the enquiry should take. In reality, this By-law provision gives no one any special power; it is merely an administrative directive from the Pilotage Authority to its officers, and not a regulation.

It is to be borne in mind that the administrative investigation is a complete process in itself whose aim is merely to ascertain a factual situation. The rules of evidence do not apply, although the quality of the enquiry may well suffer if they are ignored altogether, e.g., a report based merely on hearsay evidence should be treated with great caution. No one is on trial and no one's rights can be affected at that stage, except in most exceptional circumstances and on the basis of public interest, and such accessory consequences must necessarily be very temporary and must always be followed by a trial. In penal matters, this is the process of arrest before trial, and, in the case of the reappraisal of a pilot's qualifications, it is preventive suspension, a subject which will be studied later.

Because these enquiries are solely for the purpose of making executive decisions, they must normally be carried out with the least possible delay and without interference. There are no parties involved and only the Authority who caused the enquiry to be held has the right to interfere (*The Queen v Bernard Randolph and World Wide Mail Services Corporation* 1966 S.C.R. 260). There is no publicity whatsoever and proceedings and findings are confidential, unless the Authority responsible decides otherwise. For the same reason, evidence gathered at these enquiries can not serve as evidence against any one at a penal trial. But, as will be seen later, there is no objection to using such evidence during the reappraisal of a pilot's qualifications, provided it is fully disclosed to the pilot that he is given full opportunity for a complete defense and hearing. These reports have been repeatedly used illegally by Pilotage Authorities as evidence in disciplinary cases with the exception of the most serious cases when the pilot concerned insisted on a full trial.

Informal investigations are a daily occurrence in the administration of pilotage, especially in Districts where the Minister is the Pilotage Authority. Since decisions must be made in Ottawa, a full report of the facts and cir-

cumstances in all cases must be prepared locally by the Authority's local representative (District Superintendent or Regional Superintendent) and forwarded with recommendations to the Pilotage Authority for decision.

That full powers to conduct an enquiry are lacking is borne out by the facts: no Pilotage Authority has ever tried to compel the attendance of civilian witnesses; any investigations held have always been informal; only voluntary evidence has been collected; on the rare occasions when evidence was taken under oath, the oath was not administered by virtue of authority derived from Part VI C.S.A. or from any other provision of the Act but because the investigating officer happened to be also a Justice of the Peace or a Commissioner for the Superior Court in the Province of Quebec. This procedure is not only questionable, it is completely illegal because a Justice of the Peace and a Superior Court Commissioner are capable of administering oaths only when they are acting in that capacity, which is not the case here. This is a reprehensible abuse of the power to administer an oath; it is also a censurable practice because indirectly it tries to make use of a power which Parliament specifically denied to Pilotage Authorities. It is, therefore, considered this practice should cease until existing legislation is amended. Any oath taken under these circumstances is worthless and can never constitute a charge of perjury. Hence, the procedure is nothing more than a subterfuge and an illegal means of coercing witnesses.

The effect of the lack of special powers of investigation is evidenced by pilotage investigations carried out in the past. When Captain Jacques Gendron served as Regional Superintendent in the St. Lawrence River Districts, Sept. 1959-Dec. 1961, he carried out most of the enquiries for the Quebec, Montreal and Cornwall Pilotage Authorities, especially the investigation of shipping casualties when a pilot was involved. He did not limit his investigations to pilots' conduct but covered all aspects of the cases. He never waited for a specific appointment or instructions but immediately proceeded on his own whenever he became aware of a situation that he thought needed investigation. Because it was part of his duty to keep the Pilotage Authority informed of what was happening in his Region, he considered it his duty and responsibility to gather all possible information as soon as possible and to report without delay.

When a ship is involved, an investigation is always urgent because the ship concerned may be about to depart with the result that witnesses are not available. In Districts where the Minister is the Pilotage Authority, as noted earlier, according to the procedure established in the By-laws, the pilots are obliged to report verbally without delay any shipping casualties or incidents in which they are involved, and in writing as soon as possible thereafter on a form, colloquially called the "pink form", that is to be filed immediately with the Pilotage Authority's local representative. Normally, this officer made a quick, cursory investigation in order to send a preliminary

report at the same time he forwarded the pilot's accident report to Ottawa, but when the Regional Superintendent was appointed for the St. Lawrence Region, the Supervisors of the Montreal and Cornwall Districts ceased to perform these duties. Now the District Supervisors merely transmit the pilot's report to the Regional Superintendent without comment and, since he is stationed nearby, he immediately proceeds with his investigation. In the District of Quebec, however, the former practice is followed with the difference that the pilot's report and the Supervisor's comments are sent to the Regional Superintendent rather than to Ottawa. If the Regional Superintendent considers further investigation is indicated, he carries it out himself.

Captain Gendron stated that he did not wait to receive a pilot's report before investigating: as soon as he heard of a casualty from any source he proceeded immediately and, on occasion, he was aboard a vessel very soon after an accident occurred.

When he was satisfied that further investigation on his part would add little to the pilot's casualty report, he made his report to Ottawa with his recommendations for further action, i.e., whether further official investigation was needed or whether the case should be considered concluded, together with his suggestions for disciplinary action.

The procedure he followed was summary and very informal. He had never received any directives from his superiors how to conduct enquiries. Upon receipt of information that there had been a casualty he tried to board the ship involved as quickly as possible to meet the Master and request his permission to investigate. If this was granted, he proceeded to examine the witnesses about their training and qualifications and obtain details of the accident. Generally, this examination was under oath, but not always, and it was Captain Gendron's understanding that this was left to his discretion; his problem in this respect was not whether witnesses were telling the truth but the language barrier, and he did not want to put witnesses in an ambiguous situation if their recorded answers were incorrect because of faulty interpretation. He stated that he had never found a witness refusing to answer on the ground of self-incrimination. When he first started, he took statements in writing but, later on, he used a dictating machine. The statements were generally in the form of questions and answers, word for word as much as possible. On a few occasions he was accompanied by a stenographer who took depositions verbatim.

The pilot was not invited to attend because Captain Gendron tried to obtain information with the least possible delay. On the other hand neither the pilot nor the shipowner was prevented from accompanying him. Sometimes they attended with their counsel and he always allowed them to put questions to the witnesses. On some occasions consular officials also attended. He never felt that their presence interfered with or impeded his work. Generally, however, he was alone when he made enquiries on board ships.

Although language differences raised problems of interpretation the Department of External Affairs refused him authority to employ official interpreters because they were too expensive and difficult to locate. Therefore, he had to devise a make-shift solution: voluntary interpreters who worked without remuneration. Normally these volunteer interpreters did not belong to the ship and were sworn in beforehand.

After collecting all the evidence he could, he forwarded his report to his immediate superior, the Superintendent of Pilotage in Ottawa, with his comments and opinions about the cause of the casualty, and also his view whether the pilot or the Master was at fault. He gave opinions and recommendations but, once again, he never received any directive from Ottawa in this regard. He simply felt that this was part of his duty and he was never told not to follow that procedure.

He took the same action whenever a pilotage offence came to his knowledge.

Captain Gendron also stated that he always had the entire co-operation of the pilots' associations and that they never interfered in questions of discipline or with his enquiries.

Captain Gendron added that he thought he derived power to take evidence under oath from sec. 552, Part VIII C.S.A. He was obviously mistaken, first, because he was acting for the Pilotage Authority and not for the Minister; second, because sec. 552 does not apply to "shipping casualties" (sec. 551) nor to statutory offences or breaches of regulations committed by pilots, but only to "accidents" on board ships; third, because authority to hold any enquiry provided for in Part VIII of the Act requires a specific appointment from the Minister as an essential prerequisite. However, he was not certain of his powers under this section since he never forced his way on board a ship during the many investigations he conducted. On one occasion, the Master of a Dutch vessel refused to allow him to inspect his ship and even asked him to leave, with which he complied. This ended the investigation in that case.

All such investigations carried out by a Pilotage Authority, either through the District Supervisor or the Regional Superintendent, were, therefore, unofficial fact-finding enquiries carried out to help the Authority decide what further action should be taken.

(b) Medical examinations

When the only question involved is the physical or mental fitness of a pilot which can be determined by a medical examination, the Pilotage Authorities have interpreted the provisions of subsecs. 329(f) and (j) as empowering them to compel a pilot to submit to a medical examination, at their entire discretion.

Such a claim is obviously too wide. While it is true that unless pilots can be compelled to undergo medical examinations the power to retire pilots on medical grounds would be in practice denied, this is obviously an ancillary power which does not have to be defined, but at the same time this power is essentially limited by the principal power on which it depends, i.e., the existence of a *prima facie* case of physical impairment which is incompatible with piloting. In the context of the present Act periodical compulsory examinations and discretionary powers to force pilots to undergo examinations as a matter of routine appear *ultra vires* of the legislative and administrative powers of Pilotage Authorities.

This requirement is found in By-law provisions and non-compliance creates an offence. At present District By-laws contain two such provisions, both based on subsec. 329(j):

- (a) the periodical, compulsory eyesight and hearing examination referred to earlier;
- (b) the periodical examination to which a pilot is obliged to submit whenever the Supervisor (or the Secretary) has reason to believe there is impairment due to a physical or mental infirmity incompatible with the performance of pilotage duties.

It is considered that the right of a Pilotage Authority to compel pilots to submit to periodical medical examinations, as well as to additional examinations, entirely at the administrative discretion of a Pilotage Authority, is a definite requirement which should be clearly stipulated in the Act. Such a right is not only highly desirable in the organizational scheme of the existing Part VI but it is also considered a requirement in a system providing for a controlled pilotage service.

It is also considered that this right should be extended to cover cases of suspected impairment due to drunkenness, or use of drugs, when a pilot is on duty, or about to proceed on duty. In view of the pilot's grave and heavy responsibilities, Pilotage Authorities should be clearly empowered by an appropriate statutory provision to order a pilot suspected of impairment to submit to an immediate medical examination, including any tests the designated physician may request. Refusal by a pilot to undergo such examinations and tests readily should be a statutory offence carrying the sole and obligatory penalty of cancellation of his licence and, in the interval until the case is decided, the pilot should automatically be suspended.

PILOTAGE AUTHORITY'S LIMITED REMEDIAL POWERS

Once a Pilotage Authority becomes aware of any situation which needs to be corrected or improved and which it has power to deal with or, at least, has power to cause remedial action to be taken, it is part of its surveillance responsibility to initiate a corrective procedure.

Action of two types is involved:

- (a) an immediate corrective measure of a temporary and subordinate nature, i.e., preventive suspension;
- (b) initiating remedial procedures, i.e., prosecution of offences, reappraisal of the qualifications of the pilot concerned or reporting to the authority who is empowered to deal with the case.

PILOTAGE AUTHORITY'S POWER TO IMPOSE PREVENTIVE SUSPENSIONS

Preventive suspension is the temporary withdrawal of a pilot's licence pending adjudication of the holder's competence to pilot.

Although it is essentially a temporary measure, it is nevertheless an infringement on the free exercise of a right before judgment and even before the pilot concerned is given the opportunity to defend himself. It is, therefore, an extraordinary power which should not be used unless superior interests are at stake in very exceptional circumstances.

It is for this reason that under the scheme of pilotage organization provided by the present Canada Shipping Act this measure is authorized in only two specific cases which, by their nature, raise a serious presumption that the pilot involved is clearly a safety risk:

- (a) the Pilotage Authority may suspend the licence of a pilot pending the outcome of a charge either laid or to be laid regarding the alleged commission by the pilot of the indictable offence described in sec. 369 C.S.A., i.e., of having endangered a ship or persons on board by breach or neglect of duty or by reason of being under the influence of liquor or narcotic drugs (sec. 370);
- (b) the officer presiding at a Preliminary Enquiry, convened by the Minister of Transport under the powers he derives from Part VIII of the Act, may suspend a pilot's licence pending the decision of a Court of Formal Investigation when he is of the opinion that the shipping casualty "has been caused by the wrongful act or default or by the incapacity of the pilot in charge" or that such pilot has shown his unreliability by the commission of "any gross act of misconduct or drunkenness". The suspension automatically lapses if within three days a formal investigation is not ordered (subsec. 555(2)).

Case (b) is studied later when the powers of the Minister of Transport, as such, over pilots' licences under Part VIII C.S.A. are reviewed. Court decisions in cases where the exercise of this power has conflicted with the rights of individuals will also be studied.

When the provisions of sec. 370 of the present C.S.A. were first introduced in 1875 they gave Pilotage Authorities much more drastic power. The 1873 Act contained no corresponding section. Before 1875, Pilotage Authorities, despite the seriousness of the situation, could take no action against a pilot's licence until judgment had been rendered by a regular tribunal of penal jurisdiction. Only a conviction by such a court empowered a Pilotage Authority, in its licensing capacity, to reappraise the reliability of a convicted pilot and to decide whether, under the circumstances, he was still sufficiently reliable to retain his licence. In an amendment effected in 1875 (38 Vic. c. 28, s. 2) Parliament, no doubt appreciating that a pilot suspected of such a serious offence was *ipso facto* a safety risk and, therefore, should not be allowed to pilot, gave Pilotage Authorities not only power to impose preventive suspension but also power to cancel a pilot's licence, even before his criminal trial. The 1875 provision read as follows:

"A pilot shall be liable to suspension or dismissal by the pilotage authority of the district, for any of the offences mentioned in the seventy-first section of the said Act, upon such evidence as the said authority deems sufficient, and whether he has or has not been convicted of or indicted for such offence."

The resulting situation was that as a preventive measure a Pilotage Authority could go as far as dismissing the pilot before trial, while it retained the power to deal with the licence after conviction if the licence was not already withdrawn.

This situation remained unchanged until 1934 (vide secs. 532 and 533, 1927 C.S.A.). When the 1934 Act was passed, Pilotage Authorities were deprived of the power to deal with a licence after conviction (sec. 446, 1934 C.S.A.) and preventive power was limited to suspension (sec. 447, 1934 C.S.A.), a situation that has remained unchanged ever since.

Part of the 1934 modification was correct in that it brought preventive power into proper perspective, i.e., limiting it to preventive suspension pending the outcome of criminal proceedings, but the other modification defeated the purpose of the first and created a problem by denying Pilotage Authorities power to dismiss a pilot found guilty of such a serious offence although the power of dismissal is granted for such relatively minor offences as demanding or receiving more dues than those prescribed by law (sec. 372 C.S.A.) and may be imposed for breach of By-law (sec. 330). This amendment created a particularly awkward situation in that conviction automatically brings a preventive suspension to an end and, therefore, reinstates a pilot in the exercise of his professional function. From that point of view, he is in exactly the same position as if he had been acquitted.

In practice, secs. 369 and 370 C.S.A. are not used. They were employed in the past when sec. 370 was wrongly interpreted as giving a Pilotage Authority power to inflict a punitive suspension without prosecuting the

offence before a criminal court under sec. 369. The last attempt to make use of this provision dates back to 1956. In a letter dated April 4, 1966 (Ex. 1466(c)) Captain Slocombe, Chief of the Nautical and Pilotage Division of the Department of Transport, stated:

“...of late years we have been disposed to take a more critical look at the propriety of the legal procedure which we had been following so that at the present time we do not take legal actions against pilots under these two sections.”

The nature and the purpose of sec. 370 do not seem to have been understood by Pilotage Authorities. This is illustrated by a letter written by the Deputy Minister of Transport to the Deputy Attorney-General of Canada August 2, 1963, seeking his legal opinion as to the feasibility of using the power of suspension granted by sec. 370 as a means of discipline against a pilot. He was reminded by the Department of Justice, August 28, 1963, that “the right of the Pilotage Authority to suspend a pilot under sec. 370 of the Canada Shipping Act is incidental to the institution of criminal proceedings against the pilot for an offence under section 369” (Ex. 1466 (1)). The pertinent excerpt of the August 2, 1963 letter reads:

“We wish to consider whether any disciplinary action should be taken against either of the pilots . . . Section 370 of the Canada Shipping Act appears to give the Pilotage Authority of the Pilotage District of . . . the power to suspend either or both of the pilots involved if he comes to the conclusion that, by breach or neglect of duty, the pilot contributed to the damage to any of the ships. I assume that this section must be read in the light of the Bill of Rights and that a pilot is entitled to a hearing before the Pilotage Authority suspends him. In the absence of any provision in the Canada Shipping Act or the General By-law of the . . . Pilotage District relating to inquiries for the purpose, I assume that the Pilotage Authority may name a person to hear the evidence, giving the pilot the privilege of attending during the hearing and of cross-examining, calling evidence and presenting argument in his defence.”

This letter indicates a profound misconception of the rôle and powers of Pilotage Authorities. The quasi-judicial function of reappraisal is confused with the process of enforcing discipline and is considered a penal function. The essential nature of sec. 370 and the principles of its application are not understood. It may be said, therefore, that the provisions of sec. 370 were never employed. When, prior to 1956, use was purportedly made of this section, it was under a false assumption of its nature and hence, any disciplinary sentences awarded at that time were invalid unless they were authorized by some other provisions of the Act.

A distinction must be made between a preventive suspension and a decision taken by a despatching authority not to despatch a pilot at a given moment. By despatching, a Pilotage Authority is merely exercising the right of choice that Masters formerly possessed. Then a Master's refusal to hire a pilot was simply the exercise of his right of choice and did not amount in any way to interference with the freedom of the exercise of the pilot's profession. This situation is not contemplated by the Act, and obviously could not be, since it presupposes a power of despatching which the Pilotage

Authority does not possess at law. But if such a power is to be given in future legislation, the power not to despatch, unless the Pilotage Authority or its despatching officer is wholly satisfied with the pilot's fitness at that moment, should be differentiated from the extraordinary procedure of preventive suspension. The former is nothing more than one of the administrative decisions associated with despatching, while preventive suspension is a necessary accessory to the quasi-judicial process comprising the reappraisal of a pilot's competence. For instance, a preventive suspension must necessarily be a corollary to the withdrawal of a licence and there can not normally be a preventive suspension in a case that, in the end, does not entail the dismissal of the pilot. By contrast a tired pilot must not be despatched until he is rested.

If despatching was merely a service rendered by a Pilotage Authority to its pilots, the despatcher would be bound by despatching rules and instructions from the pilots as a group, and would have no discretion whatsoever whether or not to despatch a pilot when his turn came, unless the rules and instructions gave him some discretion. In such a case, not the Pilotage Authority but the pilots individually and as a group would bear responsibility for assignments. This was the precise situation when the Quebec pilots were grouped by their 1860 Corporation into a kind of partnership and provided shipping with pilots under a despatching system which they themselves controlled. In an 1861 judgment (11 L.C.R. 342 in re: *The Lotus*, Clark) the Vice-Admiralty Court of Lower Canada dismissed a suit for damages resulting from a collision that had been taken against the owner of one of the ships involved. The court decided that the collision was caused by the sole fault of the pilot of *The Lotus* and discharged the owners of *The Lotus* of all responsibility pointing out that the plaintiff's only recourse lay against the pilot or against the Corporation of Pilots. It was, no doubt, this decision and others of the same nature that prompted the adoption of the 1869 amendment (32-33 Vic. c. 58) to the Quebec Pilots' Corporation Act which decreed the non-responsibility in torts of the Corporation for the wrongful act, fault or negligence of any of its pilots.

However, when a Pilotage Authority imposes and controls despatching in its own name, the normal consequence is that it bears responsibility both for its errors and faults in making assignments, and also for damages caused by the wrongful acts of the pilots so assigned. In *The Lotus* case referred to, the court made the following very appropriate remark:

"This case and the consideration which arise out of it, will shew the immense importance and responsibility of the office of pilot, and the necessity which exists that the utmost care and attention should be given by the authorities who make the appointment, to see that none are appointed but those who possess the requisite qualifications and character, since it has pleased the legislator to give to those whose property is to be placed under the sole charge of the pilot, no power to select one in whom they have confidence, or refuse one in whom they have none".

By imposing its assignments of pilots on shipping a Pilotage Authority assumes great responsibilities. As was pointed out before, this undertaking was forced upon Pilotage Authorities by circumstances and by the requirements of the service. This situation was not envisaged in the present pilotage legislation which, therefore, does not provide Pilotage Authorities with the means to discharge these new responsibilities effectively. If, in future legislation, the Pilotage Authority is to be given control over the assignment of pilots, the legislation should cover the liability in torts of the Pilotage Authority as well as the Crown, and should also enable the Pilotage Authority to assure shipping reasonable protection by having the right not to assign a pilot under any circumstances, if any suspicion exists as to his fitness or competence.

This is no doubt the reason why in most Districts the Pilotage Authority retains final control over despatching, despite the extensive despatching rules that exist in certain Districts. Subsecs. 15(1) and (2) of the Quebec Pilotage District General By-law, for instance, read as follows:

“15(1) Pilots shall carry out pilotage duty when and where required by the Superintendent and shall not pilot any vessel except as directed by the Superintendent.

(2) Pilots shall normally be assigned for duty in conformity with the practice that may be in force for the equalization of trips.”

The right not to despatch a pilot when his name comes to the top of the tour de rôle should be of only very short duration, i.e., the time required to dispel or confirm doubt. If the pilot is found fit he should be considered available for immediate despatching; if not (unless his incapacity is of a temporary nature and can be remedied such as curable illness or injury, in which case the pilot concerned should be kept off the tour de rôle until he has fully recovered), a preventive suspension should be imposed, followed by whatever proceedings are indicated in the case. This aspect will be studied later.

Under the present legislation a preventive suspension can never be effected by any other procedure or in any other circumstances than those described above, i.e., in the case of a Pilotage Authority only in the circumstances contemplated in sec. 370. Such a situation may well have been the extreme limit of preventive intervention in the exercise of a free profession but it is totally inadequate in today's circumstances; moreover, it amounts to false pretenses on the part of a Pilotage Authority to impose upon a vessel a pilot whose competence it is not in a position to vouch for, but has reason to believe is temporarily unable to perform his duties adequately. This was clearly realized by Pilotage Authorities and attempts were made through regulations to extend the power to impose preventive suspension

in cases where a despatching authority would be obviously derelict if it failed to act, i.e., (a) when a pilot's ability is impaired through indulgence in alcohol or through the use of narcotic drugs; (b) when a pilot has failed the periodic eyesight or hearing examination and before a final decision is arrived at after he is given an opportunity to appeal and be re-examined (e.g. Quebec By-law subsec. 14(5)); (c) when a pilot is ordered to submit to a medical examination when the Superintendent (or the Secretary) has reason to believe that the pilot's fitness for duty is impaired by physical or mental disability (e.g. Quebec By-law subsec. 23(2)).

A pilot whose physical or mental fitness is suspected of being impaired or who has failed an eyesight or hearing examination is a potential risk, and the most elementary prudence requires that he be not entrusted with the safety of a ship and the lives of those on board until this suspicion is removed. But, under the present legislation, the sole power a Pilotage Authority possesses in this matter is through regulations made under subsec. 329(j) C.S.A., i.e., the power to retire a pilot compulsorily when impairment is established. It can not be argued that preventive suspension is an implied ancillary power on account of the exceptional character of this measure, the context of the organization provided by Part VI and, finally, because when such a power was intended it was clearly specified in the Act. Nor is it permissible under present legislation to impose a preventive suspension on a pilot suspected of being impaired by alcohol or drugs. Subsec. 329(f) empowers a Pilotage Authority to make by-laws for ensuring the good conduct of pilots and the effective performance of their duty afloat and ashore and, *inter alia*, to prevent them from piloting "while under the influence of intoxicating liquor or narcotic drugs while on duty or about to go on duty". All this provision authorizes is power to create an offence by making appropriate regulations. This provision dates back to early pilotage legislation when it was a statutory offence to act "as pilot when in a state of intoxication" subsec. 530(c), 1927 C.S.A. The 1934 Act enlarged the provision by also making it an offence to be in that state when about to go on duty. It was an amendment in 1936 that reduced this statutory offence, along with others, to a regulation offence, i.e., an offence only if the Pilotage Authority of the District sees fit to make it so by passing appropriate regulations. There were no other changes.

Therefore, under the present provisions of the Act, if a pilot is found to be under the influence of liquor when about to go on duty, and providing this has been made an offence by regulation, the Pilotage Authority's only recourse is, in addition to warning the Master of the ship, to lay a charge before a court and await a conviction before it may proceed to re-appraise the pilot's reliability. The statutory provision never authorized the Pilotage Authority to prevent a pilot to act as such before this procedure was followed.

It should be borne in mind that, in the context, the choice of the pilot rested with the Master of the ship, who would bear full responsibility for his choice, and he was at liberty not to accept an impaired pilot. As the situation contemplated by the Act no longer exists, the Pilotage Authorities when passing regulations under this statutory provision felt compelled to provide for preventive suspension. This is the reason for the requirement in a number of By-laws that the Superintendent must remove forthwith from the assignment list any pilot whose ability appears to be impaired through the use of intoxicating liquor or narcotic drugs when he is about to go on duty. Similarly, the Superintendent may take the same action after the fact when he has reason to believe that a pilot has been under the influence of liquor or drugs while on duty. In both cases, the pilot is kept off the list until a full investigation is held. The Superintendent may then replace the pilot on the assignment list or impose a preventive suspension, but in either case he must first have the approval of the Pilotage Authority after the latter has had an opportunity to consider the report of the Superintendent's investigation. Such a suspension imposed by the Superintendent is merely a preventive measure, not a punishment, and is only temporary pending further action, i.e., laying a charge for a breach of the appropriate section of the By-law. In the Quebec District the whole question is dealt with in sec. 19 of the By-law which reads as follows:

- "19 (1) No pilot shall, while on duty or about to go on duty, consume intoxicating liquor or consume or use a narcotic drug; and the licence of any pilot contravening these provisions shall be withdrawn by the Authority.
- (2) No pilot shall consume intoxicating liquor or use a narcotic drug on shore during the season of navigation, if such consumption or use prevents good conduct and constant attendance to and effectual performance of his duty on board ship or on shore; and the licence of any pilot contravening these provisions may be withdrawn by the Authority.
- (3) Where the Superintendent believes, on reasonable grounds, that the ability of a pilot, who is about to go on duty, is impaired through the use of intoxicating liquor or narcotic drugs, he shall forthwith remove the pilot's name from the assignment list and make a full investigation into the matter and submit a report thereof to the Authority.
- (4) Where the Superintendent believes, on reasonable grounds, that a pilot has been under the influence of intoxicating liquor or narcotic drugs while on duty, he may remove the pilot's name from the assignment list and shall make a full investigation into the matter and submit a report thereof to the Authority.

- (5) The Superintendent may, with the approval of the Authority following consideration of a report made under subsection (3) or (4), replace the pilot's name on the assignment list or suspend the pilot's licence."

The regulation offences and the Pilotage Authority's reappraisal power (sec. 331 C.S.A.) are stated in subsecs. (1) and (2) above. The following subsecs. (3, 4 and 5) deal with the preventive measures to be taken and the procedure to be followed. Subsec. (5) clearly distinguishes between the administrative decision not to despatch a pilot, which has to be taken forthwith, and preventive suspension which forms part of the quasi-judicial process of reappraisal. This is why subsec. (5) speaks only of suspension, like sec. 370 of the Act, and not of cancellation. Any other interpretation would be inconsistent, for instance, with the imperative provisions of subsec. (1) which states that a pilot's licence must be withdrawn if he consumes intoxicating liquor while on duty. However, it is believed that in the interest of clarity the nature of the suspension should be clearly defined.

These provisions were first introduced in the Quebec District by an amendment to the General By-law dated June 15, 1955 (Ex. 1448-23). At that time it contained a further provision respecting responsibility the Superintendent might incur in the process, which provision read as follows:

"(5) The Superintendent is not responsible for any loss of earnings by a pilot whose name he has in good faith removed from the assignment list under subsection (1), (2) or (3)".

This subsection was not reproduced in the 1957 version of the By-law, presumably because it was realized that a question of civil liability did not come within the regulation-making jurisdiction of the Pilotage Authority.

In practice, preventive suspension, as such, is never imposed but unwarranted use is made of the process of taking a pilot's name off the tour de rôle for a long period of time. Frequently the pilot is reinstated without his case being reviewed. This indirect method of preventive suspension is also used when the fitness of the pilot is being examined by an administrative Court of Enquiry, convened by the Minister under Part VIII of the Act (sec. 579 C.S.A.), where no provision exists to authorize preventive suspension in such a case. Such instances will be reviewed later (vide Pilotage District of Quebec—*Discipline*).

The fact, however, is that these regulations are, in this respect, *ultra vires*, and the unauthorized use made of these powers places the Pilotage Authority in a precarious position, in that these orders can not be enforced if a pilot refuses to comply. If a pilot is successfully barred from piloting during the time he is off the assignment list, or under preventive suspension, the Pilotage Authority might be liable to pay him the damages incurred as

a result of its own illegal action. This is particularly true when it develops, as has often been the case, that the suspicions or accusations can not be proved.

DUTY TO INITIATE REMEDIAL ACTION

Among the responsibilities of a Pilotage Authority as the Crown officer entrusted by Parliament with the administration of a District are: (i) to initiate proceedings whenever it learns a pilotage offence has been committed; (ii) to reappraise a pilot's qualifications whenever a situation defined in legislation arises; and (iii) to bring to the attention of other authorities any incidents that fall within their jurisdiction for remedial action and to co-operate with them in this connection.

Except on the ground of insufficient evidence, a Pilotage Authority has no discretion whether or not to initiate appropriate proceedings, once it has reason to believe that a pilotage offence has been committed or that a pilot should be reappraised. It is the rôle of the legislative authorities, i.e., Parliament and the Pilotage Authority as regulation-making authority, to create and define offences. Once an offence is committed the Pilotage Authority, as administrative authority, has no alternative but to prosecute. To do otherwise would be to usurp legislative power. It can not amend what legislation has defined as a crime or an offence, by deciding that they are no longer so in order to meet expediency in a particular case. Such action can be taken only by an appropriate amendment to the legislation but never by an administrative decision, and on no account should the problem be avoided by mere inaction. The Pilotage Authority is charged by Parliament with the duty of surveillance, to ensure, *inter alia*, that pilotage legislation is respected and offenders brought to trial.

When enforcing discipline, speed in application is most important and the prosecution of an offence should not be delayed or influenced by other considerations. For example, a repetition of the events that attended the case of the pilots involved in the collision between the *Argyll* and the *Sunima* should be avoided. The preliminary enquiry found that the collision was due to the gross negligence of both pilots; an Advisory Committee, which reviewed the case, recommended disciplinary action against both pilots. However, the Pilotage Authority delayed such action on the ground that it might prejudice pending civil litigation. But by the time the civil suit was concluded (1962 Ex. C.R. 293), penal prosecutions against the pilots were time barred (*vide* Pilotage District of Quebec, *Advisory Committee*). The attitude adopted by the Pilotage Authority in this case indicates a lack of comprehension of its responsibilities. The safety of navigation and the efficiency of the service should always transcend the pecuniary interest of the Crown and, even more so, of private parties.

However, the obligation to prosecute is limited to instances where a *prima facie* case can be established. It would be as reprehensible to launch

prosecution in a haphazard fashion as not to prosecute at all. Once a Pilotage Authority has been informed of the alleged commission of an offence, it must forthwith hold its own investigation to learn what happened and what evidence exists to prove the offence, bearing in mind that the pilot concerned will not be a compellable witness. A charge should be laid only when it is satisfied that a conviction is likely to be obtained.

The same principles apply to reappraisal cases, the main difference being, however, that (as will be seen later) in respect of qualifications, once a *prima facie* case is established the onus of proof rests on the pilot.

When the indicated remedial powers lie with other authorities, it is the duty and responsibility of the Pilotage Authority to notify the authorities concerned without delay, to make a full report of whatever information it has been able to discover through its own investigation and, thereafter, to co-operate with these authorities. Such other authorities may be Customs Officers or Port Authorities, but generally it is the Minister of Transport because of his responsibility for safety of navigation and the special powers he derives from Part VIII C.S.A.

As will be demonstrated later, Pilotage Authorities have failed deplorably in the discharge of their surveillance duties; in addition, remedial powers, even those of the Minister under Part VIII, have been misconstrued. It is, therefore, an essential requirement that adequate powers in this respect should be given and clearly expressed in the Act, and also that proper control be exercised to ensure that each Pilotage Authority lives up to its obligations and responsibilities. Without an adequate, effective surveillance system it will not be possible to provide the efficient, reliable pilotage service that both the users and the public have the right to expect.

2. REAPPRAISAL FUNCTION

NATURE

"Reappraisal", in the context of this report, means the reassessment of a pilot's qualifications (i.e., (a) professional qualifications, (b) physical and mental fitness, (c) moral fitness or reliability) by a Pilotage Authority at any time during the tenure of the pilot's licence when cause has been established that a reassessment is warranted. If a pilot's qualifications are found wanting and the cause appears capable of correction, suspension may be all that is required, but if it is found to be serious and permanent, cancellation of his licence is indicated.

Although reappraisal is part of the licensing function, it is not ancillary to the power to issue a licence but is an original power which should be specifically granted and defined in the Act. A licence is a right, the exercise of which can not be interfered with except as specifically laid down in legislation; it is not a privilege or an appointment held during pleasure.

Reappraisal is the second phase of licensing. It is quite distinct from the first phase although both are of the same nature and must be exercised in a quasi-judicial manner. It is neither an appeal against, nor a review of, the original decision to grant a licence which is a final process in itself. If it becomes apparent that the examination process has been vitiated either by a wrongful act of the candidate or because the legislative requirements have not been followed, the recourse is to have the licence so obtained declared null *ab initio* by following prerogative proceedings before the regular courts (*Attorney General v Millar* 2 N.B. *Equity Reports*, p. 28).

In reappraising a pilot the question is not the validity of the licence but whether the licensee still possesses the necessary qualifications to continue to hold his licence.

Because reappraisal power is an original power, it need not be exercised by the authority which grants licences, although this authority is clearly in the best position to do so. In fact, under Part VI, jurisdiction for reappraisal is shared between the Pilotage Authority and the administrative courts convened by the Minister of Transport under Part VIII as cases arise. Part of this jurisdiction could also have been given to other authorities such as the regular courts as an accessory jurisdiction when dealing with pilotage cases. However, so far this has not been done.

In particularly serious cases Parliament may take the step of making reappraisal the subject of legislation. In such cases the legislative provision not only defines the situation which requires reappraisal action, but also specifies the corrective measure without leaving any discretion to anyone. This may be done in legislation in two ways: either by imposing it directly, in which case the corrective measure applies automatically as soon as the factual condition defined in the legislation occurs (e.g. the licence is automatically forfeited at the expiration of two consecutive years of non-usage, sec. 336 C.S.A.) or by determining what remedial action is to be imposed by the reappraisal authority when the factual situation has been established (e.g. compulsory retirement when permanent physical impairment is established, subsec. 329(j)).

In an organization based on licensing, the right of the licensing authority to interfere during the tenure of the licence must, of necessity, be limited to cases where a serious presumption of deterioration, or defect in qualifications, is raised by the facts. Granting a licensing authority power to reassess a licensee's qualifications at will is the equivalent of denying the permanency of the licence, with the result that it is merely a privilege granted during pleasure.

Normally, a licence should be of the longest possible duration, i.e., permanent. Holding a licence and enjoying the privileges it implies should be considered acquired rights that can not be interfered with, except in those cases specifically provided for in legislation.

It is by including such cases in the Act and by defining them, that Parliament determines the control to be exercised over licensees during the tenure of their licence. Where a service is operated for private convenience, these cases should be limited to those of a very serious nature, but the power to intervene should be much greater when public interest and safety of navigation are the *raison d'être* of the service. This explains the limited powers of control granted Pilotage Authorities under Part VI and their inadequacy for pilotage requirements today.

Between the extremes of permanent licences and a system where licences are held at pleasure there are a number of intermediate solutions. One example is the term licence. Its main disadvantage is that it does not afford the necessary guarantees and security required to attract and retain highly qualified candidates. This is no doubt the reason why term licences were not allowed originally and also why, when they were first introduced, they were denied by law to the larger Pilotage Districts where the pilotage service had to be of the highest quality. Another solution which affords more flexibility is a combination of both extremes, i.e., a system where permanent licences are limited as to competency and the most difficult and responsible assignments are reserved for a limited group of pilots, selected on the basis of high standards of qualifications and past performance. This privilege lasts during pleasure only and, furthermore, is also limited by other terms and conditions laid down in legislation. When this privilege is withdrawn, the pilot reverts to his previous status, with his permanent licence limited as to competency. In fact, this is the situation in most Districts, where the most difficult assignments are given either by the Pilotage Authority, or by mutual consent of the pilots themselves, to the most highly qualified among them. This is also the essence of the grade system adopted in the Districts of Montreal and Quebec where grade B is the highest degree of competency of a permanent nature, and grade A denotes the highest degree of competency but held during pleasure only and limited by regulations. Although this method of licensing is not permissible under present legislation it meets the pilotage requirements of these Districts today (vide C. 8, p. 263 and ff.).

Reappraisal, like the original appraisal, of a pilot, is a quasi-judicial process in that decisions are not discretionary, but are determined, on one hand, by a factual situation over which the appraising authority has no control but is obliged to establish and, on the other hand, by the law, both written and implied, which it has no choice but to apply. For the appraising authority to act otherwise is to exceed its jurisdiction, thus vitiating the proceedings.

The first applicable law is the legislative provision which establishes jurisdiction, i.e., defines the cases where reappraisal is authorized and required and which also designates the responsible authority (e.g., in shipping

casualties, the Court of Formal Investigation convened by the Minister of Transport under Part VIII C.S.A. sec. 558, and, in cases of permanent physical impairment, the Pilotage Authority, subsec. 329(j)). Since instances where a licence may be interfered with during its tenure are infringements into the exercise of a right (being cases of exception), the terms of the legislative provisions which define them must be interpreted strictly, and any doubt must be taken against the jurisdiction. Establishment of these instances not only gives the reappraising authority its jurisdiction but, at the same time, creates a presumption of incompetence on which that authority is empowered to act, unless this presumption is rebutted by the pilot concerned who, from then on, has the *onus probandi*.

The reappraising authority must also be guided in its appreciation of the competence, fitness and reliability of a pilot by the rules expressed and implied in applicable legislation. For instance, a pilot in possession of a good record should not normally be retired after his first conviction for an offence which caused reappraisal, and possibly not even suspended. In its assessment of the pilot's reliability the Pilotage Authority should be guided by his past performance, his records and the particular circumstances of the case.

Unless otherwise stipulated in legislation, the choice of the means and procedure for ascertaining the factual situation is left entirely to the responsible authority using whatever powers are placed at its disposal by legislation. For instance, formerly, physical unfitness had to be established by evidence taken under oath, a power that Pilotage Authorities had at that time (sec. 415(j), 1927 C.S.A.) which, therefore, necessitated holding a formal hearing. This requirement which, in fact, was a limitation, was abolished in 1934. The only limitation that now remains in this regard is inherent in the exercise of any judicial or quasi-judicial function, i.e., the right of full defence which is rendered by the legal axiom "*audi alteram partem*". This does not mean that the only way to proceed is through formal hearings but merely that the person whose rights may be affected must be given the opportunity to acquaint himself with the nature and particulars of the charge against him and the complete evidence on which the authority plans to act, and be afforded the opportunity to produce pertinent evidence on his own behalf and to plead. Provided this right is respected, the manner of ascertaining a factual situation is not significant. The essential point is that the reappraising authority should establish the factual situation correctly. No doubt Parliament felt that a Pilotage Authority acting as a reappraising authority needed no special powers to establish the factual situation in the few cases where it has jurisdiction because, with the possible exception of cases of impairment due to detrimental habits (subsec. 329(j)), the factual situation depends on events that are easily ascertainable, such as a physical

infirmity or a conviction. In contrast, since the type of reappraisal dealt with under Part VIII requires full powers of investigation of a court of justice, these were duly provided in the Act.

Redress will be granted by the regular courts through prerogative proceedings whenever the right to full defence is not afforded, irrespective of the merits of the case and the correctness of the decision. Redress will also be granted whenever the reappraisal authority acts without jurisdiction or exceeds it. In that case, the question before the court hearing the prerogative proceedings will not be whether the factual situation necessary to give the appraising authority its jurisdiction was established or not before the reappraising authority, but merely whether it exists or not, the proof of which is then made as in a trial *de novo*.

The reappraising process must not be confused with the enforcement of discipline. Although both are necessary means to achieve the surveillance function, their nature, their aim and the rules governing their exercise are essentially different. The fact that at times the enforcement of discipline is a necessary step in the process of reappraisal does not alter the situation; in that event, a conviction made by a competent tribunal is the factual situation that gives the reappraising authority its jurisdiction, while at the same time it creates a presumption of unreliability against the pilot concerned. Because this correlation and interdependence are not clearly understood, the two functions have been confused to the prejudice of the effective enforcement of discipline and the maintenance of an overall standard of qualifications in the service.

There is no incompatibility (except in practice) between the two functions and there is no fundamental objection if they are performed by the same person or authority. However, since Confederation (except for the special pre-Confederation status of the Pilotage Authorities of Quebec and Montreal, which was retained until the Minister became Pilotage Authority in 1905 and 1903 respectively) Parliament has ensured by its legislation that the two functions are not exercised by the same person or authority. The principle has been adopted to leave jurisdiction over pilotage offences and the recovery of penalties, to the regular courts.

The Pilotage Authority's situation with regard to its reappraisal powers is well summed up by Justice Anglin in the 1915 Supreme Court decision of *McGillivray v Kimber et al.* (52 S.C.R. 146):

"The relationship of master and servant does not exist between the Board (the Pilotage Authority in this case consisted of a local commission) and the pilot. The Board has a statutory control over the licensing of pilots within the territory for which it is constituted. Its jurisdiction to cancel a pilot's licence is also statutory and arises only after it has been satisfied either by a quasi-judicial investigation, held after fair notice has been given to the pilot and he has had a reasonable opportunity to make his defence (...), or by the production of a conviction thereof made by a competent tribunal, that the commission of an offence subjecting the pilot to cancellation of his licence has been established."

A pilot's qualifications are threefold:

- (a) his general and special knowledge and skill make him an expert in navigation in the District for which he is licensed;
- (b) his mental and physical fitness enables him to exercise his profession;
- (c) his reliability makes him worthy of a Master's confidence, to the extent that he is trusted with the navigation of his ship.

Part VI C.S.A. gives Pilotage Authorities full powers to ensure that only qualified, physically fit and reliable candidates are accepted as pilots, but very little power to ensure that the pilots do not become safety risks after they have been licensed. The actual situation, as provided under Part VI, may be briefly summed up as follows:

A Pilotage Authority

- (a) has no power of reappraisal over professional competence;
- (b) has power over physical and mental unfitness only in cases of permanent impairment which prevent a pilot from exercising his profession;
- (c) has limited and conditional jurisdiction over the reliability of pilots, i.e., only in those cases enumerated in the Act and always provided a conviction is handed down by a regular court.

On the other hand, power of reappraisal in any of these fields was given in a limited way to the Minister of Transport acting through the administrative courts he may convene under Part VIII C.S.A.

Because the reappraisal function is basically administrative, it should not be normally attended by the publicity that accompanies the dispensing of justice. In this regard, the Pilotage Authority's inquiry is to seek sufficient information to reach a decision and, at the same time, to ensure that the rights of the pilot concerned are protected. For instance, a Pilotage Authority, acting in its reappraisal capacity, should not have to hold a formal hearing to assess a situation when physical impairment, due to illness or other causes, has arisen, or when the professional competency of a pilot has been questioned. Publicity during such reappraisal is no more necessary than during the examination and licensing of pilot candidates. However, this does not mean secrecy; the findings of a reappraisal inquiry are public records and, therefore, should be available to the public.

PILOTAGE AUTHORITY'S REAPPRAISAL POWER
OVER PROFESSIONAL QUALIFICATIONS

Except in one indirect provision, the Act has completely denied Pilotage Authorities the right to reappraise a pilot's professional knowledge and skill during the tenure of his licence. Furthermore, a pilot, once licensed, can not be forced to acquire additional knowledge or submit to any further examination, periodical or otherwise, in order to ascertain that the required standard of professional qualifications has been maintained. Such a legal situation was no doubt adequate at the time the licensing scheme which is still in force was drafted, but it is no longer appropriate because new knowledge and increased skill are constantly required. The situation is particularly grave, now that the Pilotage Authorities have undertaken responsibility for providing, as well as administering, pilotage services.

The attitude adopted in the present legislation is apparently based on the premise that while it is to be expected a pilot's physical fitness and reliability will, or may, deteriorate, his knowledge and skill can not but improve as experience is gained by practice. Conversely, prolonged lack of practice is considered detrimental. Parliament has dealt with this question indirectly on the assumption that the professional qualifications of any pilot who has not acted as such for two consecutive years may have deteriorated to the point where he may be a safety risk. Sec. 336 decrees the automatic forfeiture of the licence, but it may be revived or reissued if the Pilotage Authority is satisfied "that the former holder is qualified to hold a licence". In effect, this is an indirect way of imposing a preventive suspension pending reappraisal of a pilot's qualifications.

This premise that experience is sufficient to maintain and improve a pilot's professional qualifications may have been valid years ago but it is not acceptable under modern conditions. Nowadays, unless a pilot keeps abreast of changes and developments in ships and new techniques in the art of navigation, he soon becomes incompetent. Much can be gained by experience if appropriate opportunities occur but, in these days of change, more than experience alone is required, e.g., both theoretical and practical training remain a prerequisite for the efficient use of shipborne aids to navigation. This is especially true of radar, no matter how often a pilot may use it, and will become even more important with the advent of increasingly sophisticated navigational aids and devices. Many shipping casualties have been attributed to the faulty use of radar resulting from insufficient knowledge of its use and limitations (vide analysis of shipping casualties, Pilotage District of Quebec). The advent of bridge-aft ships has demonstrated that special training is essential each time a major change occurs in the design or particulars of ships which directly affect their manoeuvring. Such additional training may well be gained by experience provided a sufficient number of such ships enter a given District to provide opportunities for all its pilots;

but, until the necessary experience is gained, pilots can not be expected to navigate these new ships as expertly as they did the old. The consequence is that, at times, pilots will be prevented by their lack of professional competency from safely navigating in certain areas, particularly under adverse conditions, until they are more highly qualified, e.g., bridge-aft ships have posed a serious problem in the New Westminster District. As a solution, the New Westminster pilots suggested that, for pilotage purposes, these ships should be made similar to conventional ships by erecting a special bridge amidships with all the necessary controls. It appears from evidence obtained in other Districts that bridge-aft ships are no more difficult to navigate than other types, provided the pilots have become accustomed to navigate them from an aft position. This experience could be gained by special training on board these ships, in addition to the study of new theoretical techniques. The problem is compounded when the natural incentive of open competition in a free profession is taken away, and each pilot is assured of the same share of work and revenue, whether his qualifications are maintained or not. When a franchise is given to a group, unless the Authority intervenes the natural tendency is a lower standard of qualifications and efficiency to the level of the least qualified. Evidence of this nature was encountered in many Districts.

Under these conditions, Pilotage Authorities are powerless to require pilots to acquire new knowledge by further training, or compel them to submit to periodical or other examinations as to competence. The vital importance of pilot training is illustrated by the action taken by the Standard Oil Company quoted below:

“The Standard Oil Company (New Jersey) will open, in July of this year, a marine research and training center to instruct tanker masters in the specialized handling of mammoth supertankers. The \$700,000 facility, located near Grenoble, France, will be the first of its kind anywhere in the world.

Approximately 150 shipmasters and pilots, in eight-man classes lasting two weeks, will be trained each year at the center. Esso employees with a wide range of ship-handling experience will serve as instructors.

The center also will research new techniques in manoeuvring and berthing. Additional research will be done at Grenoble to confirm the behavior characteristics in restricted waters of the new goliath tankers before they are placed in service.”

“THE NEED:

Evolution in tanker design and size has made it necessary to provide additional training for officer personnel in shiphandling. The increasing need to make transitions from general purpose size trade vessels to 90,000 tonners, to 200,000 tonners has accentuated the need to provide training and experience which will accomplish this transition in the most proficient and effective way possible.” (Extract from pamphlet describing the training programme Ex. 1520.)

Each Pilotage Authority has full power to modify (and must modify) minimum professional requirements defined in regulations to meet new situations created by changes in techniques of navigation, types of ships, shipborne and other aids to navigation. However, such new regulation re-

quirements would apply to future licensees only and could not be imposed on pilots who now hold a licence, irrespective of how urgent and necessary additional professional qualifications may be.

Present legislation provides limited means, mostly indirect, to exercise control over the pilots' professional qualifications, but these are insufficient. For the most part they consist of the Minister's powers under Part VIII, term licences, licences limited as to competence, i.e., the grade system, and the possible use of disciplinary regulations.

Under Part VIII the Minister of Transport may cause the qualifications of a pilot to be investigated by a Court of Formal Investigation, whether or not there has been a shipping casualty (sec. 560) or by a Court of Enquiry (sec. 579 and subsec. 568(2)). A Pilotage Authority lacks the power to initiate such an enquiry, whether or not it deems an investigation is required. The decision as to whether such a court will be convened is in the sole competence of the Minister of Transport as defined and limited by the Act. Such an enquiry can not be used as a means of verification because a prerequisite for convening either of these courts is the existence of a *prima facie* case of incompetence and, even then, a preventive suspension can not be imposed pending the outcome of the investigation.

Indirect control can be achieved by issuing term licences (subsecs. 329(n) and (o)) (as is done in the Churchill District) but, here again, incompetence can be considered only at the time of their renewal and a Pilotage Authority is powerless while term licences last. Very little use is made of this power, possibly because of the insecurity implied for licence-holders. On occasions, a temporary licence is granted for a probationary period followed by a permanent licence if the pilot's performance is satisfactory but, as shown in chapter 8, p. 269, their legality is questionable under present legislation.

The situation is partly corrected in those Districts where the grade system exists because it allows the Pilotage Authority to reserve the most difficult assignments for those pilots who possess the highest standard of qualifications. However, the grade system is only a make-shift measure in that, under present legislation, a Pilotage Authority has no power to lower grades once they have been granted and can do no more than delay upgrading a pilot who is found insufficiently competent (chapter 8, pp. 263 and ff.).

Pilotage Authorities have also tried to obtain such control indirectly through their regulation-making power with respect to reliability, i.e., by incorporating these requirements as disciplinary regulations under subsec. 329(f). Most By-laws contain the provisions which obtain in the Quebec District (or others to the same effect):

"15 (4) Every pilot shall, before his departure to pilot any vessel, . . . obtain from the pilotage office information as to the state of the buoys, beacons, and channels in the District."

“17 (5) A pilot shall maintain his knowledge of the District . . . and shall keep himself conversant with relevant Customs, Quarantine and other port regulations and with all conditions affecting navigation within the District.”

A Pilotage Authority may provide, *inter alia*, that failure to comply with the regulations entails suspension or cancellation of a licence, not because the pilot concerned lacks the necessary knowledge but because he has shown unreliability by not obeying these regulations. The use of this method, to the extent it is permissible, merely provides a means of exposing a pilot to the knowledge he should acquire, but does not enable an Authority to verify whether the knowledge was, in fact, acquired.

PILOTAGE AUTHORITY'S POWERS OF REAPPRAISAL
OVER THE PHYSICAL AND MENTAL FITNESS
OF LICENSED PILOTS

In keeping with the guiding principle of Part VI C.S.A. that pilotage is a free profession, the power of a Pilotage Authority to review the physical and mental qualifications of its licensed pilots is limited to cases where the pilot's condition has deteriorated permanently to such a degree that his usefulness as a pilot is impaired and he must, therefore, be retired. Otherwise a Pilotage Authority has no power to intervene.

The governing provisions of the Act are:

- (a) sec. 338 which requires that a pilot be “declared capable of performing his duties as a pilot by a medical officer appointed by the pilotage authority” before annual licences are granted to pilots aged 65 to 70;
- (b) subsec. 329(j) which authorizes the Pilotage Authority to provide by regulation “for the compulsory retirement of any licensed pilot who has become incapacitated by mental or bodily infirmity or by habits detrimental to his usefulness as a pilot”.

Sec. 338, which was incorporated in the Act in 1934 (sec. 328, 1934 C.S.A.), decreased the power formerly held by Pilotage Authorities to re-appraise older pilots. The corresponding provision in the previous legislation, sec. 432, 1927 C.S.A., which was basically the same as sec. 36, 1873 Pilotage Act, reads as follows:

“Every licensed pilot shall, on his attaining the age of sixty-five years, produce and deliver up his licence or branch to the pilotage authority of the district to which it extends, and such authority may grant him a new licence for one year, and so from year to year”.

At that time there was no statutory age limit but the Act provided that a limit could be set by regulations. Except for wording, the present subsec. 329(i) corresponds to subsec. 18(9) of the 1873 Pilotage Act.

Until 1934, when a pilot's licence came up for annual renewal at the age of sixty-five, the Pilotage Authority had full powers of reappraisal and could refuse to renew the licence if any of the pilot's qualifications no longer met the standards required. The 1934 amendment, in addition to setting the ultimate age limit for holding a licence at seventy, deprived Pilotage Authorities of their powers to reappraise by limiting the renewal requirement to physical fitness, as determined by a medical officer. Hence the Pilotage Authority's present function is reduced to appointing a medical officer and, once this routine appointment is made, the Authority is bound by the medical decision. If the report is favourable, the Authority has no option but to renew the licence; if unfavourable, it has no choice other than the compulsory retirement of the pilot.

The 1934 amendment had the advantage of giving the pilots more security by restricting the scope of appraisal to physical fitness, the reason why an age limit was, in fact, established. It is considered that the remainder of the amendment has imposed a questionable procedure in that the decision whether a pilot is physically fit to perform his duties is left, without a criterion of any kind, to the judgment and knowledge of a medical officer who may know little about the physical standards required for the performance of pilotage duties in a given District. Pilotage Authorities have no power to define in their regulations the standards which should be required for such a physical examination and there is nothing in the Act which obliges this medical officer to observe the physical and mental standards required when a licence is issued. Another drawback is that the pilots are at the mercy of an erroneous medical opinion, since they have no opportunity to provide additional medical evidence on their behalf. A person who is medically fit to work at a certain trade may be unfit, however, to ply a number of others; the governing factors are the nature of the trade and the circumstances in which it is exercised. Similarly, and for the same reasons, pilotage duties may be far more demanding in one District than another. Only a person fully conversant with the requirements of the exercise of pilotage in a given District is competent to decide whether a certain physical condition constitutes an impairment. Since the Pilotage Authority of the District or the Board of Examiners appear to be best qualified to reach an equitable decision, it is considered that either the Pilotage Authority or the Board acting on its behalf should be responsible for reappraising pilots. A medical opinion should be part of the process but the pilot concerned should have an opportunity to question the opinion of the appointed medical officer, especially by producing other medical evidence to counter any adverse report.

The By-laws of the Districts of B.C. (37(4)), Halifax (25(5)), Montreal (18(5)), and Saint John, N.B. (25(5)) contain a subsection which prescribes compulsory semi-annual medical examinations for pilots over 65 years of age, i.e., those holding annual licences issued pursuant to sec. 338 C.S.A. It reads as follows:

“Every pilot holding a temporary licence issued pursuant to section 338 of the Act shall undergo a medical examination as to his mental and physical fitness to perform the duties of a pilot by a medical officer appointed by the Authority in April and November of each year, and if the medical officer reports that the pilot is unfit to perform his duties by reason of any mental or physical disability the pilot’s licence shall immediately cease to be valid.”

The first part of this provision pertains to the surveillance function and the powers derived from it are in relation to the available remedy. This provision obviously can not be based on subsec. 329(j) of the Act because it applies only to the retirement of pilots under 65 years of age. Therefore, it must fall under subsec. 329(i). It is considered that this subsection authorizes no more than the establishment by regulation of an upper age limit, either 65 or under 70. If subsec. 329(i) is interpreted as giving a Pilotage Authority the right to impose any conditions on annual licences issued pursuant to sec. 338, this would have the effect that these licences would be held conditionally. However, this is prohibited by the last part of subsec. 329(i) which makes the exercise of this power subject to the provisions of sec. 338, i.e., the licence must be for a one-year term only and the pilot’s physical fitness must be certified before a new licence is issued.

In the second case, a Pilotage Authority’s only power, provided it has made the necessary regulations, is to retire compulsorily any pilots who have become permanently disabled before attaining the age of 65. Since the legislative power of a Pilotage Authority is delegated, its scope is determined by the terms of delegation, which should be interpreted strictly. Subsec. 329(j) C.S.A. authorizes Pilotage Authorities to provide by regulation for the compulsory retirement of pilots under 65:

- (a) in case of mental or bodily infirmity (in other words a condition of a permanent nature); or,
- (b) for habits detrimental to their usefulness as a pilot (again the word “habit” connotes permanence).

It is noted that compulsory retirement implies the permanent withdrawal of a licence and not a temporary suspension and that the infirmity or habit must render the pilot incapable. The word incapacitated is not directly qualified but it is clear from the context that the incapacity must be in connection with the performance of duties and the discharge of responsibilities as a pilot.

Except for one point of style, subsec. 329(j) C.S.A. corresponds in substance to subsec. 18(10) of the 1873 Pilotage Act. Two minor changes were made when the 1934 C.S.A. was passed: (a) the former phrase "by habits of drunkenness" was enlarged to read "by habits detrimental to his usefulness as a pilot"; (b) the phrase "proved on oath before the Pilotage Authority" was deleted. The last part of the amendment is in keeping with the new policy adopted at that time to the effect that evidence before a Pilotage Authority should not be given under oath and that a Pilotage Authority should not have the power to administer oaths. Therefore, the 1934 amendment involved no substantial changes; the procedure was modified slightly and the reviewing powers of Pilotage Authorities remained as limited as before.

However, these limited powers are inadequate in the context of the new requirements of a pilotage service controlled by a Pilotage Authority. This is reflected in the various By-law provisions adopted in most Districts. Except for a few accessory powers, these provisions are all similar in substance to those contained in the Quebec By-law, studied hereunder.

Sec. 14 of the Quebec By-law sets the eyesight and hearing standards required by pilots while their licences are effective and provides for verification, *inter alia*:

- (a) compulsory, periodical eyesight and hearing examinations every five years for a pilot under 50 years of age, and every second year for a pilot over 50 (This Bylaw can not be binding on pilots over 65 because the Pilotage Authority's regulation-making power on the matter is limited to pilots under 65.);
- (b) these examinations must be conducted by a board composed of a qualified medical officer, an officer of the Department of Transport, both selected by the Authority, and a representative of the Pilot's Committee;
- (c) the standard tests are specified in subsecs. (3) and (4);
- (d) failure at this stage entails automatic suspension of the licence;
- (e) subsec. (6) states that if suspended, a pilot "may appeal to the Authority for another examination at his own expense". The By-law does not state whether the Pilotage Authority may deny the appeal and, if so, on what grounds. For that reason, it would appear that an appeal is a right the Pilotage Authority can not deny. At first sight it appears that a new examination, in view of the fact that it is being paid for by the pilot, could be conducted by a physician of his choice. However, when the section is read as a whole it appears that it is a re-examination before the same board which is therefore requested to reverse its previous opinion;

- (f) subsec. (7) states that “the decision of the Authority, following the appeal of a pilot who fails to pass an eyesight or hearing examination, is final”.

Except for eyesight and hearing standards this By-law is confusing. It appears that examinations are held in two stages: fact-finding by a board, followed by a decision by the Pilotage Authority to retire a pilot if it is satisfied, on the basis of the board’s decision, that the pilot is unfit for pilotage duties. Since members of the board are at one and the same time judges and expert witnesses, an appeal is, in fact, merely a re-examination by the same board, and there is no provision for a pilot to offer medical evidence from medical officers of his choice. The provision which stipulates temporary suspension pending the result of an appeal under subsec. (6) is *ultra vires* because the only permissible interference with a pilot’s licence under subsec. 329(i) C.S.A. is compulsory retirement. The By-law, as drafted, leaves the final decision to the Pilotage Authority, but fails to define the Authority’s powers. The only permissible power in such a case is to retire a pilot, in other words, to withdraw his licence, but such a power exists only if, and when, it is stipulated in a By-law, which has not been done here. Possibly this could be inferred from the context but, since it is a question of exception which requires strict interpretation, the lack of an express provision may well mean denial of the power. If this is accepted, all of sec. 14 of the Quebec By-law is meaningless and unenforceable.

Originally this By-law provision was more in conformity with subsec. 329(j) and the wording of the former regulation helps to explain the present faulty drafting. The last part of sec. 25 of the 1928 Quebec District By-law (Ex. 1448) read as follows:

“Any pilot or apprentice who fails to pass such examination shall be retired and his license cancelled by the Pilotage Authority; provided, however, that he shall have the right to appeal to the Pilotage Authority for another examination to be held at his own expense. The decision of the Pilotage Authority shall then be final.”

Because the only permissible power to take action against a pilot was to enforce his retirement, the 1928 By-law logically decreed mandatory cancellation of the licence immediately after an adverse finding by a Board of Examiners. An appeal to the Pilotage Authority was permitted; if this succeeded the Authority could renew the licence. No doubt it was realized that this procedure was illegal because in subsec. (j) there was no stipulation authorizing reissuance of the licence (as in sec. 336). No doubt it was also felt that the pilot should be given the opportunity to offer his defence before cancellation was ordered while, on the other hand, since an unfavourable report created a presumption of unfitness, the pilot should not be allowed to perform pilotage. Hence, the solution was adopted of imposing a preventive suspension after the first report and delaying cancellation until the outcome of

the appeal was known. However, due to a drafting error, the amendment has, in fact, deprived the Pilotage Authorities of the power to retire pilots. The power to retire a pilot for an infirmity of eyesight or hearing is not a statutory power and can be held only if it is enunciated in a regulation made under subsec. 329(j). Preventive suspension was a logical step especially in view of the awkward procedure being followed, but unfortunately it was not, and still is not, permissible under the Act.

It is considered that in this case, as in any other instance where the reappraisal function is exercised, the Pilotage Authority, or the board acting on its behalf, should sit as an administrative tribunal. It is necessary that licensed pilots be required to meet physical standards defined in the regulations and that this be subject to verification effected by a compulsory, periodical examination. In the event of an adverse finding, the Act should provide an automatic preventive suspension followed by a final decision with the least possible delay. The report of this periodical medical examination should form part of the evidence on which the Pilotage Authority, acting in its reappraisal function, bases its findings. The pilot concerned should be acquainted with this report and should be allowed to produce medical and other pertinent evidence. The Pilotage Authority should be at liberty to obtain any additional evidence deemed necessary, provided the pilot is authorized to challenge such evidence. When the evidence is complete, if it appears that the pilot's condition is not permanent or could be rectified, it should be possible to continue the preventive suspension until the pilot is able to prove that the infirmity has either disappeared or been corrected. When it appears that the infirmity is permanent and is of such a nature that it prevents the pilot from performing his duties, the pilot must be retired. It is believed that this is the logical and equitable way to deal with physical fitness, while respecting the rights of the pilots and protecting the public. This procedure can not be followed at present but it is considered that the Act should be modified to make it permissible.

In substance, all District By-laws have the same provisions regarding periodical eyesight and hearing examinations (except Churchill where there is none). The main differences between them lie in the standards to be met and whether the examination is by a board or simply by a medical officer.

In the District of New Westminster and in all Districts where the Minister is the Pilotage Authority, except Churchill and Sydney, the examination is conducted before a board of three persons, a qualified medical officer and an officer of the Department of Transport, both selected by the Pilotage Authority, and a representative of the Pilots' Committee, and where there is none, an individual selected by the pilot concerned. The B.C. District is a notable exception. Since the new 1965 By-law no one is empowered to appoint the qualified medical practitioner and, for that reason, a board can not be convened. The provision reads as follows:

“20(2) Eyesight and hearing examinations shall be conducted before a committee composed of a qualified medical practitioner, one person selected by the Authority and one person selected by the Pilots’ Committee.”

According to the text, neither the Pilotage Authority nor the Pilots’ Committee is empowered to appoint the medical practitioner and, according to the rules of interpretation, it must be concluded that the intention was that the medical practitioner not be appointed by the Pilotage Authority, because the 1965 By-law differs from the previous By-law which provided, although in an ambiguous manner, for the appointment to be made by the Pilotage Authority.

In the Sydney District, the provision was deleted in 1966 when the pilots became Crown employees.

In the Commission Districts, except New Westminster, the examination is carried out before the “medical officer selected by the Authority”.

The provision just discussed concerns only compulsory periodical examinations for eyesight and hearing. There is also a provision of a general nature, which applies to various forms of disability, physical or mental, that may make a pilot unfit for duty. If any impairment is suspected, a pilot may be compelled to submit to a number of medical examinations by medical officers appointed by the Pilotage Authority to ascertain his condition. The Pilotage Authority then acts on the basis of the medical reports. All District By-laws are the same except for minor modifications warranted by local circumstances. Sec. 23 of the Quebec District By-law reads:

“23 (1) A pilot shall report to the Superintendent when at any time he becomes aware that through defective eyesight or hearing or through any other physical or mental disability his fitness for duty is impaired.

(2) When at any time the Superintendent has reason to believe that a pilot’s fitness for duty has become impaired by reason of defective eyesight or hearing or by reason of any other physical or mental disability he may, with the approval of the Authority, order the pilot to undergo an examination or examinations by medical officers appointed by the Authority, and the pilot shall not be assigned to duty until the Authority is satisfied that the pilot is fit to perform his duty.

(3) When a medical officer appointed by the Authority reports that a pilot is unfit to perform his duties by reason of any physical or mental disability the pilot may be granted sick leave as provided in section 22.

(4) Any pilot who, in the opinion of the Authority, based upon such evidence as the Authority may deem sufficient, has

become permanently incapacitated by mental or bodily infirmity or by habits detrimental to his usefulness as a pilot shall be retired."

The only part of this section that pertains to subsec. 329(j) C.S.A. is subsec. (4); the three other subsections form part of the surveillance function, i.e., the right to impose by regulations passed under subsec. 329(f) the obligation for a pilot to report any impairment or ailment and to submit to medical examinations.

Removing a pilot automatically from the *tour de rôle* when suspicion of disability is so strong that a medical examination is ordered is, in effect, imposing preventive suspension. However logical and desirable this action may be, it is not permissible under present legislation. Subsec. (3) is not concerned with reappraisal but deals only with the remuneration of pilots when they are off duty as a result of a preventive suspension.

Subsec. (4) of the By-law purports to give the Pilotage Authority the power that can be granted by regulations made under subsec. 329(j) C.S.A., i.e., to retire any pilot who is permanently impaired by infirmity or by habits detrimental to his usefulness. This subsection is illegal because it provides for discretionary decisions, a prerogative which has no place in the exercise of the power of reappraisal. It is only when a pilot is, in fact, permanently incapacitated that the Pilotage Authority is authorized to retire him, and a medical opinion which may prove to be erroneous can not suffice to establish this fact, even if the Pilotage Authority has declared it sufficient. The regulation is also illegal because it disregards the pilot's fundamental right to a full defence.

Again the regulation is objectionable for a reason already discussed, i.e., it leaves the decision on fitness for pilotage to a medical officer.

The procedure laid down in former regulations was more in keeping with the requirements of the Act, i.e., the Pilotage Authority had a court of enquiry establish the facts in a judicial manner. Upon receipt of information, or a complaint that a pilot was allegedly unfit, the Pilotage Authority first notified the pilot of the complaint and then appointed a representative to hold an enquiry. Evidence was taken under oath, because this was a statutory requirement at that time (subsec. 415(j), 1927 C.S.A.). Formal hearings were held and the pilot was afforded the right to appear, to have counsel, to refute the complaint and to adduce evidence on his own behalf. The written report of a medical examination was not admissible but the actual testimony under oath of the physician concerned was necessary. If the members of the Board were experts in pilotage and safety of navigation, they were themselves in a position to ascertain the extent of the impairment in relation to the exercise of the pilot's duties; if not, expert evidence in that connection was required. If, after examining the report of the enquiry, the Pilotage Authority was satisfied that the complaint was well founded, it had the power to retire the pilot.

This court-like procedure was deleted by the 1955 amendment to the Quebec By-law, and eventually from the By-laws of the other Districts, and replaced by the present provision, i.e., a medical examination without a hearing.

Apparently, the court of enquiry procedure was a dead letter in the regulations which is shown by the case of ex-pilot Drapeau who was summarily dismissed on the ground of incapacity as a result of drunkenness. Despite numerous requests he was denied the right to have his case investigated by a court of enquiry, which was the procedure then in force (the case of Pilot Drapeau is studied in Part IV of the Report, Quebec District, *Discipline*).

Two reasons were advanced for abandoning the court of enquiry procedure; first the word "incapacity" was taken to mean mental or bodily condition which rendered the pilot generally incapable of performing his duties; second, the necessity for a written complaint appeared to be an absolute obstacle in practice (Ex. 1461(v)). The first reason is not well founded because the interpretation given to the word "incapacity" is correct: it corresponds to the limit of the retirement power that the Pilotage Authority derives from subsec. 329(j) C.S.A. Whether or not a Pilotage Authority is satisfied with this limited power it can not, by modifying the procedure, acquire more power than the Act provides. The second objection appears to be better founded. It is believed that the formal hearing stipulated in the By-law lacked flexibility in a number of ways: the only evidence that could be considered was testimony given before an investigator sitting as a formal court; the Pilotage Authority's power to convene a court enquiry was unduly limited to cases where a formal written complaint was received; the whole process took the form of a criminal trial, which it is not.

The Pilotage Authorities preferred to deal with cases of alleged unfitness due to habits detrimental to the efficient performance of pilotage duties, as violations of disciplinary regulations. This practice was followed for many years because it was assumed at that time that the Pilotage Authority had an almost discretionary power to withdraw a pilot's licence (Ex. 1461(v)). As is shown later, this is no longer so because the pilots, on the advice of their legal counsel, now ask for a normal trial with full rights of defence. When a Pilotage Authority tries to act as a disciplinary tribunal, it is unable to provide such a trial under the existing provisions of the Canada Shipping Act and, therefore, the situation is now hopelessly confused.

COMMENTS

Under existing legislation, a Pilotage Authority has no power to suspend a pilot's licence or even to take him off the assignment list (which in practice amounts to a suspension) on medical grounds. Its only power over annual licences of pilots over 65 years of age is not to issue another when the

licence expires, if the pilot is found medically unfit. During the tenure of other licences, its only power is to cancel the licence, when it has been established before it that the pilot suffers a permanent incapacity which renders him incapable of performing a pilot's normal duties.

While it is considered that these powers are too limited to enable Pilotage Authorities to meet present day requirements, it is also felt that the summary method adopted in the past is incompatible with the duties and functions of a licensing authority.

As was pointed out earlier, the fact that a licensing authority has to act in a quasi-judicial fashion when dealing with a licence does not bind it to the procedures followed in the regular courts. Since the requirement that evidence be taken under oath has been deleted, a Pilotage Authority has full discretion over the ways and means it adopts to ascertain the physical condition of a pilot, provided the pilot's right to a full defence is respected.

Because legislation in this respect is essential and since at least the basic physical and mental standards apply equally to all Districts (as is evidenced by the fact that the By-laws of all Districts contain substantially the same provisions on the matter), this question and the procedure to be followed should be fully covered in the Act itself and not left a subject-matter of regulations.

POWERS OF PILOTAGE AUTHORITY WITH RESPECT TO MORAL FITNESS, I.E., RELIABILITY

Reliability is the cardinal quality a pilot must possess. Whether a pilot is reliable or not is a difficult matter to establish since moral fitness is an imponderable which is established on the basis of actions, behaviour and performance.

Parliament has dealt with the reappraisal power of Pilotage Authorities by defining in legislation instances which create a presumption of unreliability and give reappraisal jurisdiction to a Pilotage Authority, i.e., conviction for certain pilotage offences as specified in the Act or in the regulations made under Part VI by Pilotage Authorities. While Parliament has given Pilotage Authorities wide powers to create such pilotage offences by legislation, it has gone to great lengths to guard against abuses by requiring that the factual situation which gives rise to this reappraisal power be established by a regular court finding a pilot guilty of a listed offence before reappraisal power can be exercised.

As in other cases where reappraisal is exercised, reappraisal of reliability can be covered in legislation in two ways: dealing with reappraisal in the Act itself or permitting a reappraisal authority to adjudicate. Parliament has adopted the second method only, although in the case of "regulation" offences it has authorized that by "by-law" the reappraisal role of Pilotage Authorities

may be reduced to a perfunctory process by leaving no discretion as to the action the reappraisal authority must take in the event of a conviction.

A verdict of guilty of one of these pilotage offences by a regular penal court not only establishes the jurisdiction of a Pilotage Authority as reappraisal authority but, at the same time, creates a presumption of unreliability against the pilot concerned. The only problem left for the Pilotage Authority to resolve (unless no discretion is permitted by the governing legislation) is whether, in the light of the pilot's past record and the mitigating evidence he may adduce, the presumption of unreliability created by the conviction has been refuted. In this case, his right to hold his licence will be reaffirmed but, if the gravity of the offence and the pilot's past record indicate a clear lack of moral fitness, dismissal is indicated. On the other hand, if it is felt that the pilot could overcome his weakness, a suspension for a given period or, possibly, a simple warning may prove sufficient deterrent.

The Act uses two different expressions to describe the reappraisal decision in such cases: at times it authorizes the pilot's "suspension or dismissal" (secs. 330 and 368), at other times it authorizes the "suspension or withdrawal" of the licence (subsec. 329(g) and secs. 371, 372, 568 and 579). According to the rules of interpretation, different expressions should refer to different situations but in this instance the Commission has been unable to make a distinction. The particular wording of most of these sections dates back to the first Federal pilotage legislation and has remained unchanged since (vide subsec. 18(7), and secs. 70, 71 and 72, 1873 Pilotage Act). This creates an unnecessary problem of interpretation which should be corrected.

Because a Pilotage Authority has no reappraisal jurisdiction without a conviction before a regular penal tribunal, the discipline of pilots is intimately related to the reappraisal of their reliability. However, all cases of discipline do not place a pilot's licence in jeopardy: only those where such action is specifically indicated; in all other cases, discipline exists *per se*.

In the Canada Shipping Act reappraisal power was not given for the following minor statutory offences since they do not affect the efficiency or reliability of a pilot:

- (a) failure by a pilot to carry his licence, a copy of the By-law and of the tariff, and refusal to exhibit them to a Master who asks for them, are statutory offences rendering him liable to a maximum fine of \$40.00 (subsec. 335(2));
- (b) failure by a pilot to surrender his licence when it is no longer valid renders him liable to a maximum fine of \$40.00 (sec. 337);
- (c) failure by a pilot to exhibit a pilot flag or pilot lights when he "goes off in a vessel not in the pilotage service" makes him liable to a fine not exceeding \$200 (sec. 366).

But the commission of any of the following statutory offences creates a presumption of a pilot's unreliability and the Act requires reappraisal of his moral fitness if he is convicted of:

- (a) one of the statutory offences listed in sec. 368, i.e., "fraud or offence in respect of the revenues of Customs or Excise", "corrupt practices relating to ships", their equipment or salvage, unnecessarily cutting cables, or aiding or abetting such offences;
- (b) endangering a ship through misrepresentation of circumstances (sec. 371);
- (c) demanding or receiving more than the prescribed dues (sec. 372).

Wide power is given to every Pilotage Authority to create by By-law other offences (subsec. 329(f)) and to make the commission of any of these offences due cause for exercising its reappraisal jurisdiction (sec. 330). Pilotage Authorities have abused this power through the device of provisions of general application by making all By-law offences reappraisal cases. When the Act does not expressly state rules or criteria, an Authority should be guided in the exercise of its legislative power by the manner in which Parliament has proceeded in the Act, i.e., in this connection to require the reappraisal of a pilot's moral fitness only for offences which create a serious presumption of unreliability. It is an abuse of legislative power and authority to jeopardize a pilot's licence for a minor breach of a By-law. As will be shown later, these By-laws are *ultra vires* because of their drafting and, therefore, are inoperative (vide p. 399). It is considered that future legislation should contain a proviso prohibiting such abuses of regulation-making power, for instance, by requiring that regulation offences which involve the power to reappraise must be specifically and individually identified in regulations.

There is, however, one notable exception, i.e., the By-law provision dealing with the use of liquor and drugs (as to the legality of its substance vide page 395), the pertinent subsections of which read as follows (e.g., Quebec By-law):

- "19(1) No pilot shall, while on duty or about to go on duty, consume intoxicating liquor or consume or use a narcotic drug; and the licence of any pilot contravening these provisions shall be withdrawn by the Authority.
- (2) No pilot shall consume intoxicating liquor or use a narcotic drug on shore during the season of navigation, if such consumption or use prevents good conduct and constant attendance to and effectual performance of his duty on board ship or on shore; and the licence of any pilot contravening these provisions may be withdrawn by the Authority."

Each of these two subsections contains two distinct parts: first, the offence; second, the reappraisal jurisdiction of the Pilotage Authority. The offence is to be dealt with like any other pilotage offence, i.e., by laying a charge before a court of penal jurisdiction. The fact that the regulation does not define the maximum fine that may be imposed means only that the Pilotage Authority did not take advantage of the power derived from the first part of sec. 330 and, therefore, the punishment that may be imposed by the court is a fine not exceeding \$100 (subsec. 331(2)). Conviction of an offence renders the second part of these provisions applicable. In the first case, the reappraisal rôle is no more than perfunctory, and the Pilotage Authority has no alternative but to withdraw the licence. In the second case, however, it has an alternative and may decide not to withdraw the licence if it believes that the circumstances of the case do not warrant such drastic action.

3. JUDICIAL FUNCTION: DISCIPLINE

NATURE OF JUDICIAL POWER

The importance of this question and the confusion that now prevails make it pertinent at this point to review briefly the principles governing judicial power. The three main powers of the state are judicial, legislative and executive. They are generally exercised by distinct, independent authorities. Although a cardinal principle of justice is that those exercising the judicial function, i.e., dispensing justice, must be independent and unbiased, there is no objection if, at the same time, they also share legislative or administrative power, or both. As a rule, a judge exercises judicial power only, but in certain special circumstances the same authority is also given other functions in the interest of administrative expediency. In pilotage legislation, when Trinity House was a Pilotage Authority it administered the Pilotage District, possessed delegated legislative powers and was also an administrative tribunal, a court of records with exclusive jurisdiction over pilotage matters.

A court's jurisdiction is civil when its function is to adjudicate a dispute between opposing parties and to decide between them; its jurisdiction is penal when its purpose is to award punishment for an offence created by legislation.

Courts may be divided into regular courts and tribunals of special jurisdiction. The latter are tribunals of exception and the terms defining their jurisdiction must receive limited interpretation; if there is any doubt, jurisdiction does not exist.

For the administration of its laws, Parliament can either have recourse to the Provincial courts already in existence by imposing new duties upon them, or giving them new powers in matters which do not come within the classes of subjects assigned exclusively to the legislatures of the provinces,

or it may create new courts for that purpose (*Valin v Langlois*, 1879, 3 R.S.C. 1 pp. 74 and 76 & ff., 1879-80, 5 A.C. p. 120). With regard to the administration of the Canada Shipping Act, Parliament has adopted both methods. For the imposition of punishments in the form of imprisonment, fines and penalties it has recourse to the regular provincial courts (secs. 683 and *seq.* and sec. 709 C.S.A.) but, to deal with particular matters, it created *ad hoc* tribunals, clearly defining their jurisdiction and giving them their necessary powers to act as such (*vide, inter alia*, Part VIII).

The exercise of the judicial function is a process by itself. Since a court does not act *proprio motu*, matters have to be referred to it, which in penal questions takes the form of complaints. Normally, it becomes *functus officio* when its decision is rendered, unless a power of revision is included in governing legislation.

As stated earlier, Pilotage Authorities were given special judicial powers in civil jurisdiction, i.e., over disputes between licensed pilots (sec. 351) or between a non-licensed and a licensed pilot (subsec. 355(2)), and over rights to pilotage dues. Because these powers presuppose the free exercise of pilotage as a profession, no use is made of them. The crucial questions, however, are which tribunals have penal jurisdiction and do Pilotage Authorities possess such jurisdiction?

PILOTAGE AUTHORITY AND PENAL JURISDICTION

For many years the Pilotage Authorities of various Districts have acted as if they possessed judicial powers over pilots in disciplinary cases and have proceeded in a very informal way to find pilots guilty of offences and breaches of regulations, to impose fines and to suspend and cancel licences. This power has repeatedly been queried in recent years.

Two prerequisites to the exercise of judicial powers are essential: unequivocal and express provisions in legislation, and the necessary powers to discharge this responsibility. No matter how desirable it may appear for Pilotage Authorities to hold these powers, there is no provision in the existing Canada Shipping Act which gives them the right to sit as a court of penal jurisdiction in pilotage matters, nor does any Pilotage Authority possess the necessary accessory powers to act as such.

On the other hand, the Canada Shipping Act provides an efficient and equitable procedure for the prosecution and punishment of offences and breaches of regulations committed by pilots without obliging the Pilotage Authority to act as a penal tribunal in cases where it is, at one and the same time, the aggrieved party, the informer and the prosecutor and, hence, clearly not in a position to render justice.

Committing a statutory offence, or a breach of a by-law, renders the offender liable to punishment in the form of a fine or imprisonment, as specified in applicable provisions, which is imposed by a regular tribunal

of penal jurisdiction as provided in secs. 683 and following. The correct procedure is to lay a charge before the proper tribunal so that the case can be dealt with according to the principles governing the exercise of penal justice. Any sentence imposed is enforceable through the various means of execution and enforcement pertaining to the court in question (sec. 685). An appeal is provided against such a conviction whenever the fine inflicted exceeds the sum of \$25 and the provisions of the Criminal Code respecting appeals from summary convictions apply (sec. 687). It is conviction for one of these offences (where it is so specified in legislation) that gives a Pilotage Authority reappraisal jurisdiction over the moral fitness of a pilot and, at the same time, creates a presumption of his unreliability. Nevertheless, no use is made of this system, and no one recalls the last time a charge was laid before a penal tribunal against a pilot for committing a statutory offence or breach of a by-law.

INTERPRETATION OF SUBSEC. 329(g) C.S.A.

Subsec. 329(g) is the only provision of the Act which gives any semblance of judicial power over some of the offences that may be committed by pilots. Therefore, it is necessary to analyze this subsection carefully in order to find out the actual meaning of its provisions, as amended in 1934 and 1936, in their context.

This subsection in its immediate, pertinent context reads as follows:

“329 . . . Every pilotage authority shall . . . have power . . . by by-law confirmed by the Governor in Council, to . . .

(b) make regulations respecting . . . management and maintenance of pilot vessels and their equipment . . .

. . .

(f) make regulations for the government of pilots . . . and for ensuring their good conduct on board ship and ashore and constant attendance to and effectual performance of their duty on board and on shore . . .; and without restricting the generality of the foregoing make regulations with respect to every licensed pilot . . . [here follows a list of suggested items that may be made the subject of disciplinary regulations such as lending his licence, acting as a pilot or apprentice while suspended, etc.]

(g) make rules for punishing any breach of any regulations made pursuant to this section by penalty or by the withdrawal or suspension of the licence or certificate of the person guilty of such breach and notwithstanding anything contained in any other provision of this Act, impose, recover and enforce any such punishment.”

“330. Every pilotage authority may, by by-law made according to the provisions of this Part, provide for the imposition of a fine not exceeding in any case two hundred dollars for the breach of such by-law, and may further so provide that suspension or dismissal at the discretion of the pilotage authority may ensue.”

The first comment is that if subsec. 329(g) effectively gave penal jurisdiction, as alleged, it would be limited to “breach of regulations” in the meaning in which this expression is used in the subsection, but the Pilotage Authority would have no penal jurisdiction over statutory offences nor over breaches of by-law which are not at the same time breaches of regulations, if any exist (this is studied later). In Part VI, the term “regulation” is used in a much more restricted meaning than in modern legislation and as defined in the Regulations Act (vide C. 8, p. 241) and is not the generic term which refers to all the legislation made pursuant to the exercise of delegated legislative power as opposed to statutory legislation. The generic word used for this connotation in Part VI is “by-law” and the term “regulation”, which, in Part VI, is found in sec. 329 only, refers restrictively to the type of “by-laws” made pursuant to subsecs. 329(b) and (f), and to nothing else. Therefore, any jurisdiction derived from subsec. (g) is limited to the application of those “by-laws” that are regulations within the meaning of sec. 329.

The second comment is that in pilotage legislation any corrective measure taken as a result of a Pilotage Authority’s reappraisal power over reliability is called “punishment”. The same word is also used in its natural meaning, i.e., to designate the sentence (the result of a penal judicial decision). This fact, together with the interdependence of the two functions in such cases, may have been the main cause of the confusion about these two powers.

It is a misnomer, an impropriety of term, to call “punishment” the result of reappraisal action on a question of reliability; it is no more a punishment than to refuse to grant a licence when a candidate fails, or to retire a pilot prematurely on grounds of physical impairment. At this stage, the only question to be decided by the Pilotage Authority is whether, under the circumstances of the case for which a pilot has been found guilty and punished, and taking into account his character and past performance, it is reasonable to believe he can still be trusted to pilot. Otherwise his licence must be withdrawn because he is considered unreliable. On occasions, a term of suspension may be deemed a sufficient deterrent because moral fitness is a quality and, therefore, is capable of being improved. A term of imprisonment or a fine awarded by a penal court is not concerned with moral fitness but is imposed because the law has been broken. However, a licence is withdrawn because it is considered that the pilot is no longer qualified.

The fact that reappraisal of reliability is made conditional on the enforcement of discipline contributes to the confusing use of the term “punishment”.

Therefore, to use the language of the Act for those offences where the reappraisal function is required, legislation has provided two types of “punishment”: the sentence imposed by the court dealing with the offence, and an additional “punishment” of a pilotage nature, affecting the pilot’s right to act as such, which is imposed by the Pilotage Authority, if and when the pilot has been found guilty by a regular court.

This is further supported by the use of the term “guilty” to identify the person whose licence or certificate may be suspended or cancelled. A person is considered in law to be guilty only when convicted. It is considered that in future legislation a term should be found to designate the reappraisal action and that the term “punishment” should be used only in its natural meaning, i.e., to indicate the sentence awarded for the commission of an offence.

The situation is further confused when power is granted a reappraisal authority to impose a penalty in lieu of cancelling or suspending the licence where such a penalty is considered to be a sufficient deterrent in the circumstances. Such a power was granted to the Quebec Pilotage Authority in 1877 (40 Vic. c.51 s.7); it was retained until repealed by the 1934 Act. This provision (sec. 534 in the 1927 C.S.A.) read as follows:

“534. Whenever the pilotage authority of Quebec has power to dismiss or suspend a branch pilot for and below the harbour of Quebec, it may fine such pilot in a sum not exceeding one hundred dollars, if it deems it advisable so to do in lieu of dismissing or suspending him.”

A similar power was never extended to the Pilotage Authorities of the other Districts. However, such power is extended to the administrative courts of Part VIII, subsecs. 568(3) and (4) which read as follows:

“(3) The court may, instead of cancelling or suspending any such licence, penalize any licensed pilot in any sum not exceeding four hundred dollars and not less than fifty dollars, and may make order for the payment of such penalty by instalments or otherwise, as it deems expedient.

(4) Any penalty incurred under this section may be recovered in the name of Her Majesty in a summary manner with costs under the provisions of the Criminal Code relating to summary convictions.”

A further comment prompted by the text of subsec. (g) is that whatever power a Pilotage Authority may derive from this subsection, is limited to the question of “punishment”. The power to impose a punishment does not imply that its holder also has power to hold a trial, although a trial before a court and a court decision as to guilt are prerequisites to the imposition of a punishment.

As explained before, the Act has grafted the reappraisal of moral fitness onto the administration of discipline and has made jurisdiction for reappraisal conditional on conviction for a stated offence obtained in the regular manner through a regular court. The question of fact as to the circumstances of the case that may cause reappraisal is determined judicially at the trial for the offence conducted before the regular tribunal. Hence, while both the regular courts and Pilotage Authorities have powers of "punishment", each in their own field, Pilotage Authorities do not have, and need not have, the power to conduct a penal trial.

The only powers a Pilotage Authority may derive from the last part of subsec. (g) relate solely to whatever power it has to impose punishment. Furthermore, by the use of the words "such punishment" these powers are further limited, (a) to punishment in the form of either penalty, suspension or withdrawal of licence, and (b) in relation to "regulation" offences as above defined.

The Act throughout always makes a clear distinction between power of penal jurisdiction and the power of reappraisal exercised by a Pilotage Authority. Whenever the only punishment provided is penal sanction of an offence, it takes the form of a term of imprisonment (sec. 369) or a fine (sec. 331, subsec. 335(2), secs. 337 and 366, subsec. 340(2), and secs. 356 and 367), and the same language and drafting form are used whether the offender is a licensed pilot, the Master of a ship or any other person. The first part of the section defines the offence(s) and the second part states the maximum permissible punishment without mentioning which authority is to award the penal sanction. By contrast, when the commission of an offence also gives rise to the reappraisal of a pilot's moral fitness, the same method is employed in the first part of the provision, but a second specific part is added. The section then, first, as before, defines the offence and the maximum penal sanction it entails without indicating which authority is to take action but, in addition, states the extent to which the licence of the pilot may be affected and, in contrast with the other part of the section, the Pilotage Authority is mentioned as the authority empowered to impose the additional punishment (secs. 330, 368, 371 and 372). Sec. 371, for instance, after defining the offence reads as follows:

" . . . is liable, in addition to any liability in damages, to a fine not exceeding two hundred dollars, and if he is a licensed pilot the proper pilotage authority may suspend or cancel his licence."

The fact that the Pilotage Authority is named only in the last part indicates that the Authority has nothing to do with the trial and with the imposition of the penal sanction. If the Pilotage Authority had not been mentioned in the last part, the sanction against the licence would automatically have been added as a further punishment at the discretion of the tribunal with jurisdiction over the offence (sec. 683 and *seq.*).

The same process was adopted with regard to by-law offences (vide sec. 330 quoted earlier). Therefore, under the system adopted in the Act Pilotage Authorities did not need the power to hold a trial in order to impose the proper pilotage “punishment”. The powers to compel the attendance of witnesses, to oblige them to give evidence, whether or not under oath, and to produce documents are infringements of the liberty of individuals. They can not exist without a specific and unambiguous legislative provision to that effect, such as are granted to the administrative tribunals formed under Part VIII (sec. 556 regarding *Courts of Formal Investigation* and subsecs. 579(3)(b) and (4) covering *Courts of Inquiry* into the competency and conduct of officers and pilots). The absence of similar provisions for Pilotage Authorities means, first, that Parliament did not intend to give this power to Pilotage Authorities and, second, that Pilotage Authorities have no judicial jurisdiction in penal matters.

The next question is what powers does subsec. 329(g) give to Pilotage Authorities that they would not otherwise have had?

To study this question it is helpful to divide the subsection as its grammatical construction requires. Under this subsection, the Pilotage Authority has power by by-law to:

- (a) “make rules for punishing any breach of any regulation made pursuant to this section by penalty or by the withdrawal or suspension of the licence or certificate of the person guilty of such breach”;
- (b) “and notwithstanding anything contained in any other provision of this Act, impose, recover and enforce any such punishment”.

The full extent of the first part of subsec. (g) is to authorize Pilotage Authorities to make, by by-law, rules concerning the exercise of the “punishment” power they possess. The governing words defining the power are “make rules for punishing”; the scope of the power is limited to “breach of any regulation made pursuant to this section”; and the nature of the punishment to which the power to make rules refers is defined by the rest of the first part of the subsection.

It seems that the main difficulty in understanding subsec. 329(g) arises, first, from failure to take into consideration the first governing words and, second, from the awkward method used to define the power of punishment to which the provision refers.

As explained before, secs. 368, 371, 372 and 330 provide two types of “punishment” which are only identified descriptively but are never defined in specific terms. The penal sanction to be imposed by the tribunal which heard a trial is described only by reference to the maximum fine or the term of imprisonment it may impose; the reappraisal “punishment” is similarly expressed descriptively by reference to the form it may take, i.e., sus-

pension or withdrawal of the licence, or dismissal of the pilot, which amounts to withdrawal of his license. This is the reason why the descriptive method is used in subsec. (g) to indicate to which of the two authorities with power to impose punishment the power to make rules conferred by subsec. (g) applies.

Prior to the 1934 amendment, which basically consisted only of adding a reference to "penalty", the whole corresponding provision read as follows (subsec. 415(g)):

"(g) Make rules for punishing any breach of such regulations by the withdrawal or suspension of the licence or certificate of the person guilty of such breach;"

Under the 1927 Act, subsec. (g) possibly did more than merely confer the power to make rules regarding the reappraisal power of Pilotage Authorities in cases of offences against regulations, in that it also granted this power by implication in the absence of other specific provisions. Sec. 417 of the 1927 C.S.A., which corresponds to the present sec. 330, referred only to the sentence the court could award. This section in the 1934 Act (sec. 320) contained, however, a specific reference to the reappraisal power of "punishment" for the obvious reason that the intention was to reduce it to cases of continuing breach: "...and with relation to cases of continuing breach, may further so provide that suspension or dismissal at the discretion of the Pilotage Authority may ensue". However, before the 1934 Act came into force, this restriction was deleted by the 1936 amendment which is the origin of the present text of sec. 330. For clarity's sake, it is preferable to have this power clearly expressed, even if it is not limited.

As pointed out earlier, the rules that may be made pursuant to subsec. (g) apply only to those by-law offences that are, at the same time, regulation offences. A review of the by-law subject-matters presently provided by Part VI fails to disclose any by-law offence that could be created which is not, at the same time, a regulation offence. It is believed that this distinction was warranted in the past on account of provisions that may have existed in former legislation but, at present, it seems to serve no useful purpose. The reason may have been to distinguish between by-law offences applicable to licencees only and those applicable to other persons. At present a Pilotage Authority can create offences applicable to its licencees only; the other offences must be statutory.

The word "penalty", which was added in 1934, creates a problem of interpretation: either it is a generic term to designate pecuniary punishments in general, or it was introduced in the 1934 text for a definite purpose which was lost in the process of drafting or of the adoption of the Act.

Prior to the 1934 Act the term "fine" was never used; the term "penalty" was used instead as a generic term to refer to all types of punishments, and also more specifically to indicate a pecuniary punishment. The 1934 Act

innovated by introducing the distinction between “fine” and “penalty”. While “fine” was used in sec. 320 (now sec. 330) to refer to the sentence to be awarded by a penal tribunal, the term “penalty” was added in subsec. 319(g) (now subsec. 329(g)). According to the rules of interpretation, the deliberate use of different terms should indicate different meanings and, therefore, in the present case the rules that could be made under subsec. (g) would not apply to punishment in the form of fines that could be awarded by the regular courts for a breach of a by-law. The facts that the corresponding marginal notes were left unchanged and that the word “penalty” appears therein where it refers to fine (e.g. sec. 368) or to a term of imprisonment (e.g. sec. 369) do not alter the situation: according to subsec. 14(2) of the Interpretation Act, marginal notes “shall form no part of the Act but shall be deemed to be inserted for convenience of reference only”.

In modern legislation the word “penalty” connotes a very specific meaning. Mr. Elmer A. Driedger, Deputy Minister of Justice, in his memorandum on drafting Acts of Parliament and subordinate legislation dated October 1951, makes the distinction at page 12:

“A fine should not be called a penalty. Fines are payable only upon convictions, but penalties may be recovered by civil action. If the two terms are confused, difficulties may occur in the application of the general provisions in the Criminal Code relating to fines on the one hand and penalties on the other.”

The intention of Parliament in 1934 to distinguish between penalty and fine leaves no doubt when sec. 709 (then sec. 701, 1934 C.S.A.) is considered. It gives jurisdiction to the civil and summary tribunals mentioned therein for the collection of civil debts imposed as penalties “by Part VI or by rule, regulation or by-law made thereunder” in contrast with the other provisions contained in secs. 683 and following (then secs. 675 and ff., 1934 C.S.A.) which provide for the recovery of fines.

It is, therefore, considered that the word “penalty”, used in subsec. 329(g) since 1934, refers to the reappraisal power of “punishment” appertaining to Pilotage Authorities, and nothing else. This is further evidenced by the construction of the sentence: the disjunctive “or” indicates that the penalty may be imposed only in lieu of suspension or withdrawal of the licence but not conjointly and, therefore, pertains to the same authority, while the fine is to be awarded in addition to suspension or withdrawal of the licence, i.e., two punishments, different in nature, which belong to two different authorities.

However, in the present context of the Act, it is considered that the “penalty” in subsec. (g) is a dead letter in the law. Its use there can not mean that power to impose it is inferred, first, because the power of “punishment” of Pilotage Authorities for by-law offences is dealt with in the last part of sec. 330, which deals exhaustively with the form reappraisal “punishments” are to take and “penalty” is not mentioned and, second, because the limits of this punishment are not defined. In the absence of a stated maximum amount,

it can not be surmised that the power to set an amount is unlimited. When this power is given, a maximum is always provided (*vide* subsec. 568(4) and sec. 7 of 40 Vic. c. 51 quoted earlier). In its present form, the provision referring to penalty is incomplete and, therefore, incapable of application.

The second part of subsec. (g), which was added in 1936, creates a serious problem of interpretation, not whether it confers judicial power or merely a power of punishment but whether it describes a further subject-matter of the regulation-making power of Pilotage Authorities, or is a misplaced statutory provision conferring additional administrative powers.

At first sight, it would appear that this provision simply defines a further regulation-making power regarding "such punishment", i.e., those punishments referred to in the first part of the subsection and that, therefore, Pilotage Authorities are thereby authorized to exercise these powers in, and by, by-laws. However, this interpretation fails when it is applied to the types of power referred to. The first term is wide enough to apply both to a legislative and an administrative power. A punishment can be imposed by legislation (e.g. sec. 101, 1886 Pilotage Act: "Every penalty imposed by this Act or by any by-law made under this Act . . .") or by an authority (e.g. subsec. 707(1) prior to the 1961 amendment: "Where any Court, Justice of the Peace or other magistrate imposes a fine under this Act . . ."). However, enforcement of punishment necessarily refers to an administrative power. It is true that legislation may decree that a penalty is to be automatically enforced by a set-off, but this is only one means of enforcement. Moreover it is incomplete because it presupposes that the pilot is, or will be, indebted to the Pilotage Authority, which will not happen in all cases (e.g., in the Prince Edward Island District). On the other hand, suspension or withdrawal of a licence is enforced only by the pilot delivering his licence and ceasing the exercise of his profession. If the pilot does not comply voluntarily, the required coercion can not be effected by legislation but requires the exercise of administrative power.

The only possible interpretation is that the 1936 amendment mistakenly included a provision giving statutory powers in a section whose sole purpose was to define the regulation-making power of Pilotage Authorities. This was not a precedent. A similar error occurred in 1934 when the provisions covering the procedure for fixing the amount of the pilots' compulsory contribution to the Pilot Fund was left in the section dealing with the subject-matters of regulations (subsec. 329(1) of the present Act) despite the fact that the new statutory provision dealt with the question fully.

The next question is what special powers which Pilotage Authorities did not have before were granted by this section? It is considered that the first part "to impose . . . such punishment" was not necessary because this was already expressly conferred by the last part of sec. 330; the essential purpose of power to reappraise is the imposition of remedies. The enforce-

ment of a reappraisal decision, i.e., the recovery of a penalty (if imposing a penalty is authorized) or the enforcement of the suspension or withdrawal of a licence, poses a problem. The question is whether here the text refers to the means of enforcement or to the right to enforce.

A Pilotage Authority possesses *per se* no means of enforcement of its reappraisal decisions and, for that purpose, use must be made of those pertaining to other courts. Unless the pilot concerned voluntarily complies with a decision, means of coercion are required because, otherwise, reappraisal power would be, in effect, denied. The fact, however, that a power is granted does not entail the right to apply force unless this is specifically granted. The procedure normally adopted by Parliament is to make use of the enforcement powers of regular tribunals, e.g., in Part VIII the decisions of administrative courts are enforced through penal tribunals; for instance, the failure of a pilot to deliver his licence when it is suspended or cancelled by a Court of Formal Investigation becomes a statutory offence to be prosecuted in the regular manner before a court of penal jurisdiction (secs. 571 and 683); likewise, the pecuniary award imposed by the same court in lieu of suspension or cancellation of the licence pursuant to subsec. 568(3) is recoverable summarily with costs under the provisions of the Criminal Code relating to summary convictions (subsec. 568(4)). Similarly, in pilotage legislation decisions of a reappraisal authority are enforced through the regular tribunals; failure to surrender a suspended or cancelled licence becomes a statutory offence which must be prosecuted before a regular court of penal jurisdiction pursuant to sec. 683, for which the pilot is liable to a fine not exceeding forty dollars (sec. 337), and failure to pay voluntarily a fine duly awarded by one of the regular courts referred to in sec. 683, in addition to the other means of enforcement pertaining to that court, may also carry a term of imprisonment not exceeding six months, unless the fine is paid sooner (sec. 685). Sec. 709 provides a means to recover penalties, i.e., before courts of civil jurisdiction as a debt, and the judgment is then enforced through the means of enforcement pertaining to that court, i.e., through writs of execution against property, or through garnishment. Therefore, not only is it evident that special means of enforcement are not given to Pilotage Authorities *per se* but the Act also clearly indicates how decisions are to be enforced.

The only doubt that may still exist concerns the right and power of Pilotage Authorities to initiate enforcement proceedings, i.e., to lay charges under secs. 337 or 356 in the case of suspension or withdrawal of a licence, or to launch recovery proceedings in their own name pursuant to sec. 709. As explained in chapter 8 (p. 322), it is considered that these rights are implied in the statutory mandate of Pilotage Authorities and are necessary to preserve the autonomous and independent position of these Authorities in the organizational scheme of Part VI. Normally, all judicial proceedings instituted by an officer of the Crown in his official capacity are supposed

to be taken in the name of the Crown and through the Department of Justice. The fact that a Pilotage Authority is an officer of the Crown may raise doubts whether an Authority could institute these proceedings in its own name; in the circumstances the 1936 amendment has the advantage of dissipating possible doubts. This is the only meaning that can logically be attributed to the proviso that was added through the 1936 amendment. It is considered that the same result could have been obtained in a less ambiguous and equivocal manner by saying so plainly and in a separate statutory provision.

HISTORY OF LEGISLATION WITH RESPECT TO DISCIPLINARY POWERS OF PILOTAGE AUTHORITIES

In order to appreciate the position of Pilotage Authorities with regard to the punishment of pilotage offences, it is instructive to examine how relevant legislation evolved.

(a) Quebec Pilotage District

When the Pilotage Authority of the Quebec District was a public corporation from 1805 to 1905, it acted as a court of records duly provided with its own court officers and procedure by virtue of the Trinity House Act; its jurisdiction extended over most pilotage matters, including disputes between third parties and pilots, discipline of pilots and casualty investigations, and an appeal from its decision could be made to the highest courts. It is worthwhile noting (as already pointed out) that, although the Superintendent of Pilots and the Harbour Master were both Wardens of the Quebec Trinity House, neither could sit on the Board when Trinity House was acting in its judiciary capacity because of the conflict of interests of these two officers whose duty was to prosecute those who had violated the provisions of pilotage legislation. This court was very active and many cases are reported in the various jurisprudence digests of that period.

When, in 1905, the Minister of Marine and Fisheries became the Pilotage Authority in lieu of the Quebec Harbour Commissioners, he was vested with all the powers that this corporation had as Pilotage Authority, with the proviso, however, that the judicial function would not be exercised by the Pilotage Authority, but by persons or tribunals duly designated by him for that purpose. The relevant part of the 1905 Act (4-5 Ed. VII c. 34 s. 2) reads as follows:

“ . . . provided that nothing in this Act shall authorize the said Minister to sit as a tribunal for the trial of offences of which pilots may be accused before the Pilotage Authority; but the said Minister may, in any case not provided for in the Shipping Casualty Act, 1901, and amendments thereto, designate a tribunal or officer to try any such offence.”

In other words, the special judicial powers that the Quebec Pilotage Authority had enjoyed pursuant to the Trinity House Act were not repealed but were to be exercised by a delegate of the Pilotage Authority, no doubt to free the Minister of this time-consuming responsibility.

When, in 1906, all the acts dealing with navigation and shipping were amalgamated under the title "Canada Shipping Act", the special status of the Pilotage Authority in Quebec was retained by way of exception, and the special provisions quoted earlier relating to the Quebec Pilotage Authority's judicial powers became sec. 413 of the 1906 C.S.A.

Prior to 1905, the Shipping Casualty Act was not applicable to pilots. Quite apart from any question of discipline, the Pilotage Authority of the Quebec District had full power to investigate the competency and reliability of pilots, and to cancel their licences if they were considered safety risks. This was specifically provided for in sec. 100 of the 1886 Pilotage Act:

"100. When any ship meets with any accident by reason of the fault of and while in charge of a pilot for and below the harbor of Quebec, the master, owner or consignee thereof, or other interested person may submit his complaint in respect thereto at any time thereafter, and the pilotage authority of the pilotage district of Quebec may, upon such information as it deems expedient and with or without complaint by any person, investigate the matter and declare the branch of such pilot forfeited: Provided, . . .".

When the Minister became the Quebec Pilotage Authority this power was modified and sec. 530—the corresponding provision in the 1906 C.S.A.—read as follows:

"530. When any ship meets with an accident by reason of the fault of or while in charge of a pilot for and below the harbour of Quebec, the master, owner or consignee thereof, or other interested persons may submit his complaint in respect thereto at any time thereafter, and the Minister may, in any case not provided for by Part X of the Act, upon such information as he deems sufficient and with or without complaint by any person, cause the matter to be investigated and the licence of the pilot may on such investigation be forfeited."

The Minister as Pilotage Authority, however, was not deprived of his reappraisal powers and, therefore, in cases where legislation so provided, he had the power to impose a term of suspension or to withdraw the licence after a pilot had been convicted. The Minister retained the special power that had been granted in 1877 (40 Vic. c. 51, s.7) to the Quebec Harbour Com-

missioners to substitute a pecuniary penalty for a term of suspension or withdrawal of a licence. Sec. 554, 1906 C.S.A. reads as follows:

“554. Whenever the pilotage authority of Quebec has power to dismiss or suspend a branch pilot for and below the harbour of Quebec, it may fine such pilot in a sum not exceeding one hundred dollars, if it deems it advisable so to do in lieu of dismissing or suspending him.”

This provision was retained until deleted in 1934.

Sec. 558, 1906 C.S.A. provided Quebec or Montreal pilots with an appeal to the Superior Court of Quebec from any judgment rendered against them by any tribunal or officer designated by the Minister as Pilotage Authority for the District of Quebec under the authority of Part VI for trial of any offence.

Pursuant to this right of appeal, the conviction of Pilot Gariépy by the Superintendent of the Quebec District was quashed by the Quebec Superior Court March 25, 1936. Gariépy, a Montreal District pilot, had refused an assignment from the Quebec Superintendent on the ground that he was not physically fit to take charge of a ship. The Superintendent disbelieved him and, without granting him a hearing, fined him \$40 and suspended him from the tour de rôle until the fine was paid. Gariépy appealed the decision to the Superior Court which maintained his appeal and declared the sentence imposed by the defendant illegal, null and ultra vires and set it aside with costs. The grounds for the judgment were that the Superintendent had acted in an arbitrary manner and had abused his power (Quebec Superior Court file No. 32151, copy of judgment Ex. 1466(d)).

When the Canada Shipping Act was revised in 1934, all these special provisions were deleted and, as far as disciplinary powers were concerned, the Quebec Pilotage Authority was made to conform with the rules applicable to other Pilotage Authorities.

(b) Montreal Pilotage District

In the Pilotage District of Montreal, the Montreal Harbour Commissioners had judicial powers similar to those enjoyed by Trinity House in Quebec but, in 1900, at the pilots' request, the Pilotage Authority was deprived of its judicial powers and “The Montreal Pilots' Court” (63-64 Vic. c. 36) was created for the District of Montreal. It was presided over by a Commissioner appointed by the Minister and was assisted by one or more assessors. This court had jurisdiction over all charges and complaints made against pilots for any offence against the Pilotage Act or any regulation thereunder; moreover, it had all the powers of punishment the Montreal Pilotage Authority enjoyed. There was a stipulation, however, that as soon as a local Judge in Admiralty of the Exchequer Court was appointed, all the powers

and jurisdiction of the Montreal Pilots' Court were to be transferred automatically to the Exchequer Court of Canada (Admiralty side) and that the local Judge in Admiralty would have all the jurisdiction and authority conferred upon the Montreal Pilots' Court by the Act. These provisions became sec. 515 and following in the 1906 Canada Shipping Act, and were retained in the 1927 Act (secs. 495 to 509 inclusive).

As was the case in the Quebec District, the 1934 C.S.A. deleted all these special provisions, and pilotage offences in the Montreal District were to be prosecuted in accordance with the procedure then set out in the Act, which was applicable to all Pilotage Authorities without exception.

(c) Other Pilotage Districts

Between 1873 and 1934 the Pilotage Districts of Montreal and Quebec alone enjoyed a special status with regard to enforcing discipline. This situation arose because of their status as a Court that had been granted to them by special statutes prior to Confederation. The other Districts had to resort to the regular courts for this purpose.

The ultimate paragraph of sec. 18 of the 1873 Pilotage Act clearly expressed this requirement regarding punishment for a breach of a by-law:

“... Every penalty imposed by any such by-law . . . , shall be summarily recoverable with costs by civil action or proceeding at the suit of the Crown only, or for any party suing as well for the Crown as for himself . . . before any court having jurisdiction to the amount of the penalty in cases of a simple contract, upon the evidence of any one credible witness other than the plaintiff or party interested . . .”.

The 1873 Act did not indicate how the punishments provided for the commission of statutory offences were to be obtained. This was corrected in the 1886 Pilotage Act by the addition of a new comprehensive provision, sec. 101, which provided a uniform procedure for recovering all penalties whether concerning statutory offences or breaches of by-laws. This new section contained, in essence, the provisions of both present secs. 683 and 709. It read as follows:

“101. Every penalty imposed by this Act or by any by-law made under this Act, . . . may be recovered or enforced with costs by civil action or proceeding at the suit of the Crown only, or of any person suing as well for the Crown as for himself, . . . before any court having jurisdiction to the amount of the penalty, or in any summary manner before a stipendiary magistrate, police magistrate or two justices of the peace, under the Act entitled ‘An Act respecting summary proceedings before Justices of the Peace,’ . . . upon the evidence of any one credible witness other than the plaintiff or person prosecuting . . .”.

No change has been made since in the substance of these provisions.

DISCIPLINE AND MORAL FITNESS—REAPPRAISAL REGULATIONS
(SUBSECS. 329(f) AND (g) AND SEC. 330 C.S.A.)

The Pilotage Authorities of all Districts except Churchill have taken advantage of their legislative power in the fields of discipline and reappraisal. The uniformity of needs combined with the influence of D.O.T. has resulted in a quasi-complete standardization of these provisions, thereby indicating that most of them should be covered in the Act itself and not made the subject-matter of regulations. Similar provisions to those in the Halifax General By-law, which are quoted later, are found almost verbatim in most Districts.

It is through these regulations that the Pilotage Authorities tried to give themselves the enforcement powers they needed to exercise the extraordinary powers they have assumed. Hence, as is to be expected, a great number of these provisions are *ultra vires*.

(a) *Regulation offences (subsec. 329(f) C.S.A.)*

As already explained, Pilotage Authorities have not taken advantage of subsecs. 329(b) and (f) to create offences and provide for the reappraisal of holders of pilot vessel licences and pilotage certificates. With regard to pilot vessels, it is to be noted that the licence is issued to the vessel (sec. 364) and, therefore, it might be questionable whether disciplinary regulations could be enacted that would be binding upon the Master, operator or owner. It would appear that the only action a Pilotage Authority could take would be against the licence or against the vessel, possibly through *in rem* proceedings. Should it be found desirable to provide penal sanctions against the Master, owner or operator, a specific provision in the Act would be required.

The Act contains provisions creating offences that may be committed by apprentices (e.g. sec. 368) and, in Districts where an apprenticeship system exists, the regulations normally contain disciplinary regulations governing their conduct. There seems to be no problem in this field and the question need not be studied in detail. The principles enunciated hereunder regarding pilots apply *mutatis mutandis* to apprentices; suffice to say that since apprentices are not any one's employees, whatever control a Pilotage Authority may have over them must be based on specific provisions in the Act and must also be consistent with their status as apprentices under Part VI.

As far as pilots are concerned, in order to give effect to the organization envisaged in Part VI, the Act has created a number of statutory offences and through subsec. 329(f) has authorized Pilotage Authorities to create other offences, provided they come within the scope of the subject-matters defined in subsec. (f) as qualified by the context of the Act. (The meaning of the pertinent part of subsec. (f) was studied in C. 8, pages 271 and following.)

For ready reference, subsec. 329(f) authorizes the Pilotage Authority:

(1) to make regulations for:

- (i) “the government of pilots”;
- (ii) “ensuring their good conduct on board ship and ashore”;
- (iii) for ensuring their “constant attendance to their duty on board and on shore”;
- (iv) for ensuring “effectual performance of their duty on board and on shore”;

(2) “and without restricting the generality of the foregoing, make regulations with respect to every licensed pilot...who, either within or without the district for which he is licensed” (here follows a list of instances that could be made regulation offences, most of which were statutory offences prior to 1934).

The first comment is that since what is described in subsec. (f) is the subject-matter of the legislative power of Pilotage Authorities, it can be made effective only by regulations. Therefore, a regulation which authorizes the District Superintendent to make orders for “the conduct of pilots” is an illegal delegation of a legislative power, because orders regarding the conduct of pilots must be defined in the regulations themselves and can not be delegated to form part of the discretionary administrative power of a Pilotage Authority, and even less of one of its subordinates (vide C. 8, p. 293 *et seq.*) (B.C. By-law, subsec. 3(1)(a)).

In subsec. 329(f), as in the other subsections which describe subject-matters of the regulation-making power of Pilotage Authorities, the terms used must be read in the context of the Act. When taken in isolation they may appear to give wide legislative power on the subject but they must be read in their context which qualifies and limits them. Any regulation that clashes with its context is *ultra vires*. For instance, the power to make regulations for “the government of pilots” and for “constant attendance to . . . their duty on board and on shore” differs, depending upon the status of the pilot: to disobey the despatching authority’s orders concerning an assignment is the subject of a disciplinary regulation in a law where the authority is given the right and duty to control the service, but it is incompatible and, hence, *ultra vires* in a law based on the free exercise of the pilot’s profession. Therefore, the following provisions of the B.C. By-law (P.C. 1965-1084) are *ultra vires*:

“23(1) Pilots shall undertake pilotage duty when and where required by the Superintendent and shall not pilot any vessel except as directed by the Superintendent.

. . .

- (4) Unless he has been granted leave of absence pursuant to sections 34 and 35, a pilot shall
 - (a) hold himself ready for assignment to any vessel;
 - (b) report to the pilotage office immediately upon the conclusion of any trip or movage attended by him; and
 - (c) keep the Superintendent informed of his whereabouts at all times."

Although the Act contains no rule stating how legislative power on the subject-matter of disciplinary regulations is to be exercised, Pilotage Authorities are once again limited by the context of the Act and must be guided by the general, implied rules of regulation-making and must be limited by the action already taken by Parliament in that field, e.g., care should be taken not to infringe in spheres already covered by statute. When Parliament covers a subject by creating specific offences, no scope remains for regulations and any regulation offences made on that subject would be null because they would, in effect, amend an Act of Parliament, a power that no Pilotage Authority possesses. For instance, that part of sec. 28 of the B.C. By-law which requires a pilot to carry with him, when on duty, an up-to-date copy of the pilotage rates of the District is illegal, because this is already the object of a statutory offence. In this case, the regulation provision is more than a mere repetition of the Act: it amounts to an amendment of the Act in that the By-law offence carries a much more severe punishment than the statutory offence (sec. 335 C.S.A.).

Again, because the provisions of subsec. 329(f) are the subject-matters of legislation by regulations, they must be fully covered in the regulations without leaving any discretion to any one to determine what may or may not constitute an offence. Regulations should be so worded that offences are readily identifiable by those to whom disciplinary regulations apply. Therefore, regulations phrased in general terms which may give rise to various interpretations are illegal and constitute, in fact, an illegal delegation of legislative power to a judicial authority. Since penal matters are matters of exception, they must be strictly interpreted and, unless the offence is described without ambiguity, the provision must be considered inoperative. For instance, the terms of sec. 3 of the B.C. By-law, which authorizes the Superintendent to make orders verbally or in writing regarding, *inter alia*, the attendance of pilots before him, and the terms of subsec. 32(c), which makes it an offence for a pilot to "disobey the order of the Superintendent or the Authority", to neglect his duty, or to misbehave, are too wide to be capable of application. It can be made an offence to refuse to appear before the Superintendent only if, pursuant to some other provision of legislation, the Superintendent has the right to order a pilot to appear before him. A pilot is obliged to obey orders issued by the Pilotage Authority and its Superintendent only if the

command or order is lawful. A prohibition against misbehaving first requires a definition by regulation of what conduct is expected of a pilot. In fact, the commission of any offence, especially a statutory offence, constitutes misbehaviour. There is no place in disciplinary regulations for general, ambiguous terms. It is, of course, much easier to phrase regulation offences in general terms but this is detrimental to the administration of justice and discipline. Discipline does not exist for its own sake: it is the ultimate means to give effect to legislation.

It should be remembered that while all offences are faults, all faults, whether wrongful acts or wrongful omissions, are not offences. A fault becomes an offence only if and when it is defined as such in legislation and a punishment is provided for its commission. It is against the principle of penal justice to make offences of all faults through this device of regulations couched in general terms.

One of the essential prerequisites of good discipline is a precise code of discipline, i.e., disciplinary provisions that are clear, reasonable, realistic and easy to apply.

It is preferable to have an incomplete code of discipline than to create offences that a Pilotage Authority does not intend to apply or that are not capable of practical application. It should be remembered that in the exercise of its surveillance duty a Pilotage Authority has no choice except to prosecute an offence once it has been committed and, therefore, the creation of a new offence by regulation creates *ipso facto* an imperative duty to enforce the regulation (vide C. 9, p. 350).

The greatest single factor for undermining authority is disrespect for, and disregard of, the law, if the example comes from the very Authority who is charged with ensuring that the law is respected. A legislative provision which is not enforceable or not intended to be enforced should never be included in legislation. Equally, a provision that becomes inoperative should be removed. Disciplinary regulations should be proportionate to the power of enforcement an authority possesses, and an executive authority which has accessory legislative power should never place itself in such a predicament by enacting unrealistic provisions. A good example of this is the lack of flexibility of pilotage regulations regarding the use of alcohol which are so drastic that they are deliberately not being applied, thereby defeating the very purpose of their existence (vide pp. 333 and ff.). The consequences of an adverse report are so considerable that despatchers cover up cases of drunkenness rather than report them, thereby allowing pilots who are safety risks to continue to pilot to the detriment of the service and the safety of navigation. A despatcher can not help being afraid of making a mistake when he appraises the condition of a pilot who is being despatched, because he may feel that the sequence of events his report will initiate are disproportionate to a situation which he does not consider overly serious. Once a despatcher's

report is made, the pilot concerned is immediately suspended; the despatcher's superior investigates and reports to his superiors in Ottawa; they, in turn, study the matter. The pilot's suspension will not be lifted unless and until the Pilotage Authority in Ottawa is satisfied the complaint is unfounded; otherwise, formal disciplinary action must be launched. (The M.V. *Arrow* incident [vide Pilotage District of Quebec—*Discipline*] is a good example of the intricate situation which may develop as a result of an adverse report.) Hence, it is little wonder that despatching clerks have gone to great lengths to avoid involvement and reported only those cases where the pilots failed to co-operate or when the infraction was so flagrant that it could not be hushed up. Under these circumstances it is also understandable that District Supervisors condoned the practice, thus defeating one of the main purposes of the District By-law.

Discipline is not created by severity in the text of the law but by reasonable, realistic provisions which are sufficiently flexible to avoid unnecessary hardship and, at the same time, are easy to apply.

(b) Distinction between civil and penal responsibility

The quasi-criminal character of disciplinary regulations must also be clearly understood. Civil liability must not be confused with penal responsibility and, in the same way, competency and fitness should not be confused with discipline. Pilotage Authorities should not try to secure through disciplinary regulations those reappraisal powers that are denied them by the Act. The correct procedure is to propose to Parliament an appropriate amendment to the Act but, until this is done, it is as illegal to exercise these powers indirectly under the cover of disciplinary regulations as it is to exercise such unauthorized powers directly. For this reason regulations like subsecs. 28(a) and (c) of the B.C. By-law appear to be of doubtful legality:

“28. Every pilot shall

(a) keep up to date in his knowledge of the District;

. . .

(c) keep himself familiar with relevant customs, quarantine and port regulations and with all conditions affecting navigation within the District.”

Such knowledge forms part of the professional qualifications of a pilot over which, once a licence has been issued, a Pilotage Authority has no control (vide pp. 357 and ff.). A Pilotage Authority can not gain such control over pilots indirectly under the pretext that this requirement aims at promoting the effectual performance of their duties, any more than under the present legislation it can make a regulation offence any failure by the pilots to keep up-to-date their knowledge of radar or their skill in handling new types of ships which enter, or may enter, their District.

Furthermore, if the pilots bear any responsibility under customs or quarantine legislation and port regulations, provision should be made in the legislation concerned but not made the subject of pilotage regulations, unless this is specifically authorized and required by statute. Since this is not the case here, sec. 26 of the B.C. By-law which requires the pilots to “comply strictly with all directions given by the Harbour Master relating to the mooring and unmooring, placing or removing of vessels within the limits of the authority of such Harbour Master” is illegal when made the subject of a pilotage regulation. This provision is, in effect, a delegation of administrative power from the Pilotage Authority to the Harbour Master, which presupposes that the Pilotage Authority possesses the power to give such orders to pilots. This is not so. Therefore, such a provision is *ultra vires* when contained in regulations made by the Pilotage Authority and any power the Harbour Master may have over the pilots must be derived from other legislation.

It is not the aim of pilotage legislation to have the professional work of pilots overseen and checked by a Pilotage Authority any more than the actual exercise of his profession by a lawyer or a physician is scrutinized by a legal or medical association, except when a professional man acts in a criminal or quasi-criminal manner or to the detriment of his profession. Human error, errors of judgment, lack of knowledge and skill can not be made the subject of disciplinary regulations. All these failings pertain to the field of civil liability against which aggrieved parties may sue before civil courts. Since 1936, a pilot's liability in pecuniary damages has been limited by statute to \$300 (subsec. 362(2)) in cases where damages were caused “by his neglect or want of skill”, but civil liability is not limited in cases of wilful wrongful act or gross negligence. Normally, the civil liability of a professional man is an adequate incentive to exercise reasonable care and to maintain his qualifications. Possibly this incentive was taken away from pilots when their civil liability was limited to \$300 by the 1936 amendment. However, it is improper to try to correct the situation by replacing the normal deterrent of civil responsibility by a penal provision. The limitation of \$300 is obviously too low: an aggrieved party never sues a pilot in damages, obviously because the loss of time and the trouble and expense such civil proceedings entail make them unprofitable. The situation should be remedied by a substantial increase in the liability limit and, possibly, by requiring pilots to carry a bond to ensure that civil suits are not in vain; this is dealt with further in a Recommendation.

It is only when the “neglect or want of skill” assumes a criminal or quasi-criminal aspect that it becomes a disciplinary matter. Mr. Justice Noel of the Exchequer Court, in a recent judgment (*Bélisle v Minister of Transport*, Exchequer Court in Admiralty, file No. 308, dated April 5, 1967, Ex. 1468) analysed the meaning of the term “wrongful act or default” found in subsec. 568(1)(a) C.S.A.:

“The wrongful act or default so involved does not necessarily have to be of a criminal or quasi criminal nature. It has been said that it can be a breach of

legal duty of any degree which causes or contributes to the casualty under investigation (cf. *The Princess Victoria* [1953, 2LI., L.L.R. 619] at p. 627).

An error of judgment in a moment of difficulty and danger, however, does not necessarily render an officer's certificate liable to be dealt with. There is no test that has been formulated that serves in all circumstances for determining when an act or omission is of a character that calls for the imposition of a disciplinary action. Possibly as useful a test as any is that the wrongful act must be the doing of something that "plainly" he ought not to have done and the default must consist in omitting to do something which it was "plainly" his duty to do (cf. *The Carlisle* [1905-1908, Aspirall's Report of Maritime Cases, vol. X N.S. p. 287] per Bargrave Dean P. at 293)."

Sec. 568 C.S.A. deals with a situation which is midway between civil wrongdoing and criminal or quasi-criminal wrongdoing, i.e., wrongdoing which indicates that a pilot is a safety risk. Therefore, while any wrongdoing may render a pilot liable to pay an indemnity to the victim, a plainly wrongful act is needed to give the reappraisal Courts listed in Part VIII the right to impose a remedial sanction. But much more is required to render wrongdoing the object of penal legislation: the wrongful act must have been intentional or the negligence deliberate. The least that can be said is that disciplinary regulations which do not meet the test devised by Mr. Justice Noel are clearly *ultra vires*.

It is further considered that this penal field seems to be fully covered by secs. 369 and 371 of the Act and, if such is the case, any further regulation on the matter is illegal. For instance, a general provision on this matter such as contained in sec. 29 of the B.C. By-law is illegal:

"A pilot shall exercise the utmost care and diligence in the safe conduct of the vessel to which he is assigned and shall at all times observe the practices of good seamanship."

If this By-law provision is taken literally, a strange situation results in that negligence that would not give rise to a civil action might cost a pilot a fine of \$200 plus loss of his licence, because the By-law provides these sanctions for breaches of regulations. This is an abnormal situation since civil law does not require "utmost prudence" but merely normal prudence under the circumstances of the case.

Most of the remaining disciplinary regulations in the B.C. By-law and those in the By-laws of other Districts are of questionable legality, when they are considered within the context of the Act.

That part of sec. 27 of the B.C. By-law which requires a pilot to report when "any violation of the law on the part of other vessels is observed" is illegal, because such a requirement does not come within the terms of subsec. 329(f) C.S.A. or any other provision of the Act. Part VI imposes no police duty whatever on pilots. For the same reason, it is considered that the requirement for a pilot to report a shipping casualty or an incident in which the vessel he was piloting was involved is also of doubtful legality. Unless there is a specific provision in the Act, a pilot can not be forced to file a

report which may incriminate him or, at least, assist in the preparation of a case against him. While it is considered highly desirable that pilots should be obliged to report casualties and incidents in view of the public character of the pilotage services they perform, it would appear that a statutory provision, such as exists with regard to Masters of a Canadian ship or of a British ship in Canadian waters (sec. 553 C.S.A.), would be necessary. Pilotage Authorities have no power whatsoever with respect to shipping casualties. There is no provision in Part VI to empower a Pilotage Authority to make regulations regarding shipping casualties in order to assist the Minister in the discharge of his responsibilities under Part VIII, nor is there anything in Part VIII which obliges pilots to assist the Minister to obtain information prior to an investigation by a Court of Preliminary Inquiry or a Court of Formal Inquiry.

It is considered that subsec. 30(1) of the B.C. By-law, which makes it a regulation offence for pilots to consume alcohol while on duty or about to go on duty, is *ultra vires* because it does not come within the terms of subsec. 329(f) C.S.A. The mere fact of drinking an alcoholic beverage can not be termed misconduct and does not necessarily affect a pilot in the satisfactory performance of his duties: it is impairment through alcohol that may be made an offence, as suggested by subsec. 329(f)(iii). To make an offence as a preventive measure of the mere consumption of alcohol without impairment or the use of narcotics when on duty or about to go on duty would require the inclusion of a specific provision to that effect in the Act. Its desirability, however, is questionable. As pointed out earlier, it is not the severity of the text of legislation that enforces discipline, because too strict a provision is unlikely to be implemented. The correct solution is to lay down a reasonable, realistic prohibition and to enforce it strictly. This matter is dealt with further in a Recommendation. If, however, it is considered advisable to enact such a prohibition in this case, it should be made a minor offence which never places a pilot's licence in jeopardy, i.e., does not cause reappraisal action.

It is considered that most of the offences listed in subsec. 329(f) should be contained in the Act itself and should not be left to the discretionary legislative power of a Pilotage Authority. Most, if not all, of these offences have a character of permanency and of general application and, hence, ought to be prohibited in all Districts at all times, e.g., it should always be an offence for a licensed pilot to act as such when his licence has been suspended, and it should not be left to the discretion of a Pilotage Authority to decide whether or not it is an offence for a pilot to take charge of the navigation of a ship while under the influence of intoxicating liquor or drugs.

The disciplinary regulation-making powers of subsec. 329(f) are consistent and adequate only for the type of Pilotage Authority contemplated in the Act, i.e., a licensing authority with surveillance powers. If future legislation alters and enlarges the powers and function of Pilotage Authorities to

include management of the service, despatching of pilots and other powers not yet authorized, the provisions of subsec. (f) will have to be modified accordingly. If the provisions of subsec. (f) are to be retained, the text should be redrafted to make clear the nature and the scope of the regulations Pilotage Authorities are expected to enact under it.

(c) Regulations under sec. 330 C.S.A.

For statutory offences the punishments provided are terms of imprisonment up to a maximum of 12 months in the case of the indictable offences in sec. 369, fines up to a maximum of \$200 in cases of subsec. 366(2), secs. 368, 371 and 372, and \$40 in cases of subsecs. 335(2) and 337(3). These provisions also state whether or not the commission of these offences requires the reliability of the pilot to be reappraised by the Pilotage Authority and, if so, the extent of the remedial action the Pilotage Authority may take. Such action is provided only for the offences listed in secs. 366, 371 and 372 and the extent of reappraisal is suspension or cancellation of the licence. As for breaches of by-laws, the rule is set out in subsec. 331(2), namely a fine not exceeding \$100 (with no reappraisal of the pilot's reliability) which applies automatically, unless, as an exception, a different punishment and/or reappraisal sanction is specifically provided. Thus, by by-laws passed under sec. 330 a Pilotage Authority may vary the maximum amount of the fine by specifically providing for a given offence a lower or a higher maximum, but not to exceed \$200. In addition, in each case, a Pilotage Authority may by by-law provide for the suspension or the cancellation of the licence, to be imposed by the Pilotage Authority as reappraisal authority, i.e., may determine which regulation offences cause reappraisal of a pilot's reliability. Therefore, a Pilotage Authority need not make use of sec. 330 unless it wishes to vary the maximum penal punishment imposed by subsec. 331(2).

It is obvious that the purpose of sec. 330 is to permit Pilotage Authorities to provide in legislation for punishments that fit the offences. The scale of these punishments is to be proportionate and consistent, and the criteria to be followed are found in the context, i.e., the fines enumerated earlier which are provided for the defined statutory offences. It is illogical that a minor regulation offence should carry a greater punishment than any statutory offence. The aim of sec. 330 is to provide for specific exceptions to the rule posed by subsec. 331(2), i.e., to provide by regulations, where warranted, specific penal punishments for specific offences, and also to determine specific cases calling for reappraisal. Therefore, it is considered that it is against the spirit of the legislation to make use of the legislative power of sec. 330 solely to amend subsec. 331(2), that is, to replace the statutory rule by a regulation rule thus providing another provision of general application wherein the maximum permissible punishments are provided in all cases, namely, a fine not to exceed \$200 plus, even for the slightest breach of the least important

by-law provision, the risk of suspension or dismissal. It is realized that the maximum amount set for fines has not been raised since 1934, despite the decreased purchasing power of the dollar, but the fact that Parliament did not alter the fixed amount of these fines (especially considering that it did revise upwards the punishments provided for non-licensed pilots piloting illegally (sec. 356 as amended in 1956, 4-5 Eliz. II c. 34) and again in 1961 (9-10 Eliz. II c. 32)) indicates that Parliament did not intend to modify the criteria it had established for punishing pilots.

It is considered that in future legislation, a provision of general application, such as subsec. 331(2), should be retained giving Pilotage Authorities legislative power to vary punishments, never through a general provision, but by individual provisions, as Parliament has done in the present Act.

However, as will be shown later (vide p. 399), the general provisions contained in regulations for punishments in cases of breach of by-laws are ineffective at the present time because they are ultra vires. Therefore, except in the case of use of drugs and alcohol studied earlier, the only permissible punishment is a fine not to exceed \$100 provided in subsec. 331(2) and conviction never places a pilot's licence in jeopardy.

(d) Regulations under subsec. 329(g) C.S.A.

The By-laws of all Districts, except Churchill, contain a provision entitled "Disciplinary Measures" which appears to be based on subsec. 329(g). The version contained in the 1961 Halifax General By-law seems in substance identical to the provisions that appeared at that time in the By-laws of 20 Districts (the By-laws of the Newfoundland Districts pre-dated Confederation and were not made under Part VI). In 1965 and 1966 in eight Districts the provision was replaced by a new section which is studied later. Sec. 23 of the 1961 Halifax Pilotage District General By-law read as follows:

- "23(1) Every pilot who is found by the Authority to have violated this By-law is liable
- (a) to a penalty not exceeding two hundred dollars; and
 - (b) to have his licence suspended or cancelled.
- (2) Every pilot who is found by the Supervisor to have violated this By-law is liable to a penalty of forty dollars.
- (3) Where a breach of this By-law is alleged to have been committed, the pilot accused of committing the breach shall be permitted to present his defence to the Authority either personally or in writing.
- (4) The Supervisor may recover a penalty imposed on a pilot by deduction from his earnings or may suspend the pilot's licence until the penalty is paid.
- (5) All fines imposed under these By-laws shall be paid into and form part of the Pension Fund."

In a few Districts, i.e., Bathurst, Buctouche, Miramichi, Quebec and Richibucto, these disciplinary regulations apply also to apprentices. In some Districts where the Minister is Pilotage Authority the term Superintendent is replaced by Supervisor and in the Commission Districts by Secretary. In the Restigouche District, if a defence is presented orally, it is before the Master Pilot instead of the Secretary. Subsec. 2 is found only in the Districts of Halifax, Quebec and Restigouche; therefore, in the other Districts the Pilotage Authority's local administrative officer, i.e., the Superintendent or Supervisor or Secretary, has no disciplinary power whatsoever. Subsec. 5 appears only in the Halifax 1961 By-law.

The By-laws were obviously conceived under the assumption that Pilotage Authorities have penal judicial jurisdiction over pilots. As has been pointed out earlier, this is not the case.

One interesting common feature of these By-laws is that the Pilotage Authority, whether the Minister, or a local Commission whose members are expected to be available in the District, never sees witnesses and a pilot can not appear in person before the Authority although it sits in judgment disposing of disciplinary cases indirectly as matters of administration. If a pilot wishes to make a defence, two avenues are open to him: either he does so in writing addressed directly to the Pilotage Authority or, if he wishes to defend himself verbally, he appears before the Pilotage Authority's local representative (except in the Restigouche District, before the Master Pilot) who, it is assumed, takes notes and makes a written report to the Pilotage Authority, although this point of procedure is not covered in the By-law.

A second feature is that the enquiry part of the trial is carried out, if at all, very informally. The right to a hearing to obtain evidence is not provided and the Pilotage Authority may use whatever information is available. It would appear that the term "defence", which generally means introducing evidence, mostly in the form of oral testimony by witnesses, is confused with "pleadings", which is the argument and may be either verbal or in writing.

These provisions could not have been made under sec. 330 C.S.A. because this section presupposes two distinct jurisdictions, i.e., penal jurisdiction exercised by one of the regular penal tribunals (as provided under sec. 683 and following) which tries the case and imposes a fine, and reappraisal jurisdiction which is exercised by the Pilotage Authority once a conviction is obtained. The word "penalty" used in the regulation might indicate at first sight that the regulation is based on subsec. 329(g) but this can not be correct, because in that subsection the "punishments" are alternative, i.e., the penalty is in lieu of suspension or cancellation of the licence and a penalty can not be awarded together with a suspension or a cancellation. Such action is permissible only under sec. 330 and provided it is done by two distinct jurisdictions, which is not the case here. However, it is clearly apparent that

the word penalty used in the regulation is an incorrect term and that it really means a fine. It is so identified in subsec. 23(5) of the Halifax 1961 By-law, and, furthermore, the context of provision makes it incompatible with the definition of penalty given by Mr. Driedger quoted earlier, i.e., a debt for a fixed amount which exists automatically with the advent of a condition, while here what is referred to as a penalty meets the definition of a fine, i.e., a debt imposed by a penal court as a sentence in an amount fixed by such court at the time and at its discretion within the limits provided in applicable legislation.

With reference to subsec. 23(4) of the By-law, which provides for the recovery of fines so imposed, it is considered that, for reasons explained when the last part of subsec. 329(g) C.S.A. was studied earlier, the two means of enforcement therein provided are ultra vires (vide p. 378). Unless it is specially provided for by a clear provision of the Act as under sec. 362 for dues owing and damage caused by a pilot's negligence, it is questionable whether a set-off may exist between (a) money held in trust for a pilot, in the form of pilotage dues earned by him and collected by his Pilotage Authority and (b) a fine owed to a Pilot Fund, or the Consolidated Revenue Fund in the absence of a Pilot Fund, because, although the two debts may be both existing and liquidated, they are not between the same estates. The compulsory means of enforcement through suspension of the licence until payment is effected would require a specific, unambiguous provision in the Act, which does not exist. The only time a suspension may be effected as a result of the commission of a by-law offence is in the case of sec. 330, i.e., by a Pilotage Authority in the exercise of its reappraisal powers and not as a means of enforcing the recovery of a fine. It is further considered that it is an unnecessary measure the consequences of which are disproportionate with the aim which is sought (*Gariépy v the King*, 1940, 2 D.L.R. 12).

Because a fine up to a maximum of two hundred dollars and suspension or cancellation of a licence are ordered by regulations as the punishments that pertain specifically to a Pilotage Authority when acting in its alleged penal jurisdiction over disciplinary cases, these punishments can not apply if a case is heard before a regular penal court. Since Pilotage Authorities have, in fact, no penal judicial jurisdiction, this whole provision entitled "Disciplinary Measures" is inoperative. The result is that the only possible punishment for the commission of a by-law offence is that provided in subsec. 331(2), i.e., a fine not exceeding one hundred dollars.

It is worth noting that the Supervisor or Secretary was given disciplinary powers only in the Districts of Halifax, Quebec and Restigouche. It was no doubt realized that the Supervisor or Secretary is too close to the pilots to be in a position to sit in judgment, because in most instances he is directly involved, either as the principal witness or the aggrieved party.

As will be seen in the last part of this chapter, the haphazard way various Pilotage Authorities deal with disciplinary cases was questioned before this Commission and a spokesman for the Department of Transport admitted that the procedure provided in this regulation left much to be desired from the legal point of view, especially regarding the right of the accused pilot to a full defence. The spokesman added that the Department was expecting the Commission to formulate a recommendation on the matter. However, probably on account of increased opposition by accused pilots, a new procedure was introduced, obviously to give the accused more protection. The new provision first appeared in 1965 in the three Newfoundland Districts of Botwood, Humber Arm and Port aux Basques when their first General By-law under Part VI was adopted. Later that year it became effective in the larger Districts, where the Minister is Pilotage Authority, i.e., B.C., Cornwall, Montreal and Quebec, and in 1966 in Halifax. Except for the arrangement of the text and the fact that the judicial powers are not delegated in all Districts, the provision corresponds in substance to sec. 23 of the 1966 Halifax General By-law which reads as follows:

- “23(1) Where a pilot is charged with having violated a provision of this By-law;
- (a) the Authority may appoint a person to hold an inquiry to determine the validity of the charge; or
 - (b) with the consent of the pilot charged, the Supervisor may determine the validity of the charge.
- (2) Where a person appointed pursuant to paragraph (a) of subsection (1) determines that the pilot charged has violated any of the provisions of this By-law, the Authority may impose on that pilot a penalty not exceeding two hundred dollars or withdraw or suspend his licence or both impose a penalty and withdraw or suspend his licence.
- (3) Where the Supervisor, pursuant to paragraph (b) of subsection (1), determines that the pilot charged has violated any of the provisions of this By-law, the Supervisor may impose on that pilot a penalty not exceeding one hundred dollars.
- (4) Any penalty imposed on a pilot pursuant to subsection (2) or (3) may be recovered by deduction from moneys owing to that pilot by the Authority and the Authority may suspend the licence of a pilot until the penalty imposed on him has been paid.”

The first comment is that the new provisions do not apply to apprentices in any District. Where the Minister is Pilotage Authority, the Superintendent or Supervisor is given judicial powers as well as power to impose fines not exceeding one hundred dollars but these powers are not extended to the Secretary in the three Newfoundland Districts.

The new system purports to give the accused pilot a fair and regular trial and in the Districts where the Minister is Pilotage Authority he has a choice between being judged formally by the Pilotage Authority or summarily by the Superintendent.

The only material change is the procedure set out for obtaining evidence. In order not to force the Minister as Pilotage Authority to preside at a hearing, the device was adopted of having the facts and the validity of the charge determined by a person especially appointed to hold the trial (that is, to obtain evidence in a judicial fashion while affording the pilot the opportunity to attend, to present evidence on his own behalf, and to plead) and also to render a verdict of guilty or not guilty of the charge. The Pilotage Authority's rôle is limited to imposing the proper punishment, once judgment is rendered by its appointee. This procedure applies unless the pilot elects to be tried summarily by the Superintendent (or Supervisor) who, in that event, hears the case and renders both verdict and sentence; the new provision does not specify whether the Superintendent is then required to hold an enquiry to establish the facts. The Superintendent's power of punishment is limited to a fine not exceeding one hundred dollars.

In the new regulation, however, no mention is made of the procedure to be followed at an enquiry or of the right of the accused to a defence. The powers of the enquiry officer are not defined and there is no provision to enable him to compel the attendance of witnesses, the production of documents, or to take evidence under oath. In fact, the situation that prevailed before the amendment has remained unchanged. For these reasons, as well as the reasons explained in relation to the 1961 regulation, the 1966 regulation is *ultra vires* and totally ineffective.

The sole by-law provisions which are legal from that point of view are those parts of subsecs. (1) and (2) of regulations contained in District By-laws concerning the use of liquor or drugs (*vide* sec. 19, Quebec By-law, quoted on p. 372), which determine the reappraisal powers of Pilotage Authorities under sec. 330 C.S.A., i.e., under subsec. (1) the mandatory withdrawal of the licence; under subsec. (2) a discretionary reappraisal power. Because no mention is made of penal sanctions, the rule posed by subsec. 331(2) applies, i.e., the regular tribunal hearing a case may impose a fine not exceeding one hundred dollars. In practice, however, these provisions have been interpreted by Pilotage Authorities as authorizing them to sit in judgment when these offences are committed, and remedial action arising out of reappraisal has been mistaken for the sentence a Pilotage Authority could impose as a penal tribunal.

Neither subsec. 329(g) nor any other provision of the Act justifies a rule such as is contained in subsec. 11(e) of the present B.C. General By-law which is aimed at denying a pilot the right to share in the common fund for the period of a preventive suspension. Sec. 10 of the By-law which deals with

sharing pool money on the basis of turns available for duty, is now affected by amendment P.C. 1966-980, which adds subsec. 11(e): "The time during which a pilot is off the assignment list pursuant to an order made by the Superintendent under sec. 31 shall not be included", i.e., the period of preventive suspension the Superintendent is required to impose before trial when he has reason to believe that a pilot has been under the influence of intoxicating liquor or drugs while on duty. This provision is reasonable provided there is an accompanying provision which stipulates that if the Superintendent's suspicions prove unfounded, or if the case is not proceeded with, the pilot shall have the benefit of the time during which he was prevented from performing his duties. Because this is not provided, paragraph (e) of sec. 11 is a permanent measure. The ensuing loss of revenue becomes an indirect but substantial pecuniary punishment which is imposed merely because the Superintendent had grounds to believe that such an offence had been committed, and which will stand whatever the outcome of the case. This measure is considered a desirable provision where despatching and pooling are operated by the Pilotage Authority, not as a disciplinary measure, but as a normal consequence of the right to impose a preventive suspension on the ground of safety. This would require, first, that the Act recognizes the right to impose preventive suspension in such a case, second, that provision be made for the retroactivity of the reappraisal decision, third, that where a despatching system exists, the pilot, unless later found guilty of the charge should have the benefit of the equalization of turns rule where it applies, and, where the pool is operated by the Authority, he should be entitled to a full share as if he had not been so suspended. This also presupposes the Pilotage Authority has a right which it does not possess, namely to operate the pilotage service.

4. MINISTER'S INVESTIGATIONS AND REMEDIAL POWERS

GENERAL

The Minister, as such, can not interfere in the operations of a Pilotage District which, according to law, is a totally decentralized organization and completely independent as long as it acts within its powers.

On the other hand, the Minister is the authority entrusted with the safety of navigation and, as such, on certain occasions he has to deal with cases involving pilots.

As far as safety of navigation is concerned, his principal responsibilities are, first, to ascertain the cause of every shipping casualty so that proper remedial action can be taken to prevent a recurrence, if possible; and, second, to ensure that all those who are allowed to take charge of vessels are, and remain, duly qualified and do not become safety risks. Therefore, the Minister is provided with the means to have a complete enquiry held into any shipping casualty, whether a pilot is involved or not, to have the qualifications and

conduct of any holder of a certificate or licence checked and, if necessary, to cause such licence or certificate to be cancelled or suspended. Here again, he may cause this action to be taken whether the holder is a pilot or not.

In cases where a pilot is involved, it should also be the Pilotage Authority's normal responsibility to ascertain whether the casualty was due to some fault of the pilotage organization or of the pilot and, at all times, to make sure that its pilots are, and remain, qualified and do not become safety risks for any reason.

There is nothing in the present Act to prevent both the Minister and the Pilotage Authorities from going their separate ways but because they have no special means of enquiry and only limited remedial powers, the practice has developed for Pilotage Authorities to report shipping casualties to the Minister, to provide him with any information they obtain from their own sources, and to desist from further action, unless the Minister decides not to proceed.

This *modus operandi* is realistic under the present legislation in that, in addition to avoiding unnecessary duplication and unco-ordinated effort, it assures more efficient proceedings because, in that field, the Minister has full powers of investigation which Pilotage Authorities lack.

This may also be the result of the practice established by previous legislation which prohibited a Pilotage Authority from becoming involved in any matter that could be otherwise dealt with under other Parts of that legislation which corresponds to Part VIII of the present Act.

In 1904, by 4 Edward VII c. 37, the powers of the Minister under the Shipping Casualties Act 1901 (now Part VIII, 1952 C.S.A.) were extended to include a right over pilots' licences and sec. 28 read as follows:

"28. An investigation or inquiry shall not be held under 'The Pilotage Act' or the amendments thereto into any matter which has once been the subject of an investigation or inquiry under this Act."

At the same time, the Pilotage Act was amended (4 Ed. VII c. 29) to enable the Minister to become Pilotage Authority instead of the normal local Commission; it was provided that he could never sit as a court, that cases were to be dealt with under the Shipping Casualties Act 1901 and that only those cases not provided for in that Act were to be tried by tribunals or persons which had to be designated by him.

These provisions were reflected in the 1906 and 1927 Canada Shipping Acts but, for unknown reasons, did not appear in the 1934 version and, in this regard, the Act has not been amended since.

The powers of the Minister are contained in Part VIII of the Act. The provisions which apply to pilots are those concerning:

- (a) Preliminary Inquiry (sec. 555 et seq.);
- (b) Formal Investigation (sec. 558 et seq.);
- (c) Inquiries as to the Competency and Conduct of Officers (sec. 579).

PRELIMINARY INQUIRY

The right to hold a judicial investigation into an event or into a person's conduct, merely to ascertain the facts, is an extraordinary power which implies infringement of the basic privileges of citizens and, therefore, even under Part VIII this power is granted only in very exceptional and specific circumstances. Cases involving pilots which may be the subject of a Preliminary Inquiry are restricted to shipping casualties as defined in the Canada Shipping Act. Such fact-finding investigations can not be extended to other cases not involving a shipping casualty, such as the alleged misconduct of a pilot (no matter how serious), the commission of an offence, his physical fitness or his lack of qualifications. In these cases, the Minister must base his administrative decision on nothing more than the information available from an informal investigation.

If the Minister is convinced that a pilot has become a safety risk or that some misconduct can not pass unpunished, the only power he has is to initiate proceedings against the pilot concerned; he does not have *per se* any right over the pilot or his licence. The only courses of action open to him are:

- (a) in the case of a pilotage offence or of an offence against any other legislation, he may have an appropriate charge laid before the appropriate regular court, leaving it to the Pilotage Authority to reappraise the pilot's reliability, if foreseen in the applicable section and the pilot is found guilty by the tribunal;
- (b) proceed to have the licence of the pilot dealt with when he has reason to believe that because of incompetence or misconduct the pilot is unfit to discharge his duties, by instituting a tribunal to deal with the case pursuant to either sec. 558 or 579 C.S.A.;
- (c) to refer the case to the District Pilotage Authority for whatever action it may deem necessary and has power to take.

The Minister may learn of a shipping casualty in various ways, but it is mandatory for both the pilots and Masters of the ships involved to report any shipping casualty.

The requirement for a pilot to report, which is of questionable validity (vide page 394), is contained in the General By-law of every District, except Churchill, purportedly pursuant to subsec. 329(f) C.S.A. Subsec. 17(3) of the Quebec General By-law reads as follows:

"When a shipping casualty, within the meaning of section 551 of the Act, occurs to a vessel with a pilot on board, or any incident out of the ordinary occurs in connection with the navigation of such vessel, or when any violation of the law on the part of other vessels is observed, the pilot shall report the same immediately to the Superintendent by

whatever means are available, and as soon as possible thereafter shall attend before the Superintendent and make a written report on the form provided for the purpose."

According to sec. 553 C.S.A., the officer responsible for a Canadian ship involved in a casualty or a British ship involved in a casualty in Canadian waters must report in person within 24 hours of landing to be examined at the office of the chief officer of Customs at or near the place where the casualty occurred, or in the vicinity of the place of landing. Since officers of foreign vessels are not compelled to report, unless a pilot is involved, news of any accident involving their ships normally comes from unofficial and indirect sources.

At first a brief, unofficial investigation is carried out to verify the report and to obtain whatever additional information is readily available, so that the nature and extent of the mishap can be appraised. As seen earlier, when a pilot is involved this informal investigation is carried out by the Pilotage Authority's Secretary or local representative. At the Department of Transport level the informal investigation is now carried out by an Investigation Officer (this is a new post created in 1961). The Investigation Officer is not limited to casualties involving pilots but is concerned with all shipping casualties throughout Canada. The description of his functions is as follows:

"Under direction, to hold preliminary inquiries into marine casualties; to submit reports on the basis of evidence produced and to make recommendations as to further action required; to make all necessary arrangements for the conducting of inquiries by officers of the Department into the conduct of ships' officers and pilots; to interview and obtain statements from witnesses; to make all necessary arrangements for the conducting of formal investigations by Commissioners appointed by the Minister to conduct formal investigations into shipping casualties, involving the appointment and taking of oaths of the members of the Court, notifying all parties concerned of the investigation, preparing the statement of the case, preparing the questions for the opinion of the court; to arrange for the employment of court reporters; to assist legal officers in preparing data and arranging attendance at investigations; arranging for payment of witnesses, court costs, etc.; to perform other duties related to administration of Nautical and Pilotage matters." (C.S.C. Competition 63-P-T-M-30 [Ex. 1416(b)]).

The first holder of this office was Captain J. Gendron from December 1961 until he left the Department's employ July 15, 1963. He was replaced by Captain W. A. W. Catinus April 13, 1964 (Ex. 1461(b)). The Investigation Officer has no greater power of investigation than the District Supervisor or the Regional Superintendent and he has no power to compel the attendance of witnesses. The appointment as Investigation Officer is not a blanket authority to hold Preliminary Inquiries because a specific appointment for that purpose has to be issued by the Minister in each case (sec. 555 C.S.A.) (see appointment for such a Preliminary Inquiry into the *Fort William* casualty, Ex. 1461(b)).

If the information so obtained does not enable the Minister to satisfy himself about the cause of, and circumstances attending, a shipping casualty, he is authorized by sec. 555 to appoint an officer or other person to hold a "Preliminary Inquiry". This authority is limited to shipping casualties. Although the right to order a Preliminary Inquiry does not extend to alleged misconduct of a pilot or into an alleged offence committed by a pilot before a charge is laid, a Preliminary Inquiry into a shipping casualty is not confined to ascertaining the cause of the accident but embraces all the circumstances, including the conduct and competency of all concerned unless the matter is clearly unconnected with the shipping casualty under investigation. However, there appears to be an exception in the case of pilots on account of the powers provided under subsec. 555(2) whereby the Inquiry Officer is authorized to impose a preventive suspension when during the investigation of the casualty a presumption is raised that the pilot in charge "has been guilty of any gross act of misconduct or drunkenness", whether or not this has been the cause of, or has contributed to, the casualty.

In cases involving a shipping casualty the Minister is not obliged to order a Preliminary Inquiry before reaching a decision, and there is no reason to institute such an Inquiry if he can obtain the information he needs by informal means (sec. 561). Normally a Preliminary Inquiry should be resorted to only when sufficient information is unobtainable without the special powers of investigation with which the officer or other person holding the inquiry is endowed by sec. 556.

It has only recently been considered desirable and necessary to have a formal document signed by the Minister or Deputy Minister appointing an official to hold a Preliminary Inquiry (D.O.T. letter of November 23, 1965, Ex. 1450(d)). Previously, Preliminary Inquiries were held at the request of an official of the Department of Transport, generally by telegram, but at times the request was made verbally and on occasions, when time was an important factor, the officer normally holding these inquiries carried them out as a matter of routine without any specific authorization (Ex. 1450(d)).

Normally the person appointed to hold a Preliminary Inquiry is a marine officer of the Department of Transport, holding a foreign-going Master's Certificate of Competency. There is, however, no established practice whereby the same man is appointed each time, except now that the office of Investigation Officer has been created he is normally appointed if available.

The Preliminary Inquiry is not a trial but merely a fact-finding administrative investigation in order to provide the Minister with the factual information required to enable him to decide what action should be taken. Hence, the person holding a Preliminary Inquiry has wide powers and is not limited by the rules of evidence, because the evidence it gathers can not be used against anyone in a future trial. When the Preliminary Inquiry is followed by a trial

before a Court of Formal Investigation, the letter of instructions to the counsel for the Department always stresses that the evidence adduced at the Preliminary Inquiry must not be used in the Formal Investigation, but can only serve as an aid for counsel in the conduct of the hearing. Pursuant to subsec. 558(7) a copy of the report of the Preliminary Inquiry must be furnished to a pilot whose licence may be in jeopardy before the commencement of a Formal Investigation. Since, except in the latter case, the report is for the information of the Minister alone, it is normally treated by all concerned as a confidential document, as are the accompanying documents, such as the Master's and pilot's casualty reports. However, if the Minister so decides, there is no legal objection to releasing this information to any individual, or even making it public. The first aim of this information is to acquaint the Minister with the situation so that he may take the necessary administrative decisions. It then remains part of the records of the Department and may be used in the normal course of events, *inter alia*, to assist the Crown Counsel in any suit, claim or prosecution in which the Crown is involved. There is no objection if the information is made public when it is considered sufficiently complete to inform the public about the circumstances of a casualty and that, in addition, no useful purpose would be gained by holding a Formal Investigation. But it should always be used merely as information. *Inter alia*, it can not be used as evidence on which to base a penal conviction as was the recent practice of the Pilotage Authority under the show-cause letter procedure.

The person holding the Preliminary Inquiry is given wide powers to ensure his investigation will be complete. In addition to being able to compel the attendance of witnesses, he has the right to board and inspect any vessel, to enter and inspect premises, to require the production of documents, etc. (sec. 556). His report must contain a full statement of the case and may be accompanied by any observations he may deem advisable (sec. 557).

Subsec. 555(2) gives the person holding a Preliminary Inquiry a temporary and limited power over the licence of a pilot as a preventive measure when the inquiry reveals that, *prima facie*, the pilot is a safety risk. In such a case, he may suspend the licence until the case has been dealt with by a Court of Formal Investigation; the duration of the suspension can not exceed three days unless, during that period, the Minister notifies the pilot that a Formal Investigation will be held.

This right was challenged by *certiorari* in the Fall of 1964 following the suspension of Pilot Yves Pouliot at the conclusion of the Preliminary Inquiry into the collision between the S.S. *Leecliffe Hall* and the M.V. *Apollonia* (Ex. 1457).

A first petition for *certiorari* that had been presented to the Exchequer Court (file #A-2423) was refused on the ground that, since the Exchequer Court was a statutory court, it had no jurisdiction unless such jurisdiction is

conferred upon it by statute, and none could be found. Mr. Justice W. R. Jackett, in his judgment rendered on October 21, 1964, remarked that the Minister of Transport, who was the sole respondent, was not an "Officer of the Crown" as contemplated by subsec. 29(c) of the Exchequer Court Act (1952 R.S.C. 98, Ex. 1449(a)).

A second petition, in which both the Minister of Transport and the Inquiry Officer appeared as co-respondents, was made before the Quebec Superior Court and leave for the issuance of the writ was granted by Chief Justice Frédéric Dorion on November 20, 1964 (Ex. 1449(b)). On the grounds for his judgment, the Chief Justice distinguished between the character of the Court of Preliminary Inquiry when only the powers conferred in the first paragraph of sec. 555 were applied and when those conferred by the second paragraph were used. It was held that the functions held by the Inquiry Officer under the first paragraph were purely of an administrative character and, therefore, not subject to *certiorari*; in the second paragraph, however, the Inquiry Officer would be exercising a judicial power in that he has to be convinced that the pilot is guilty of one of the "offences" enumerated therein. Mr. Justice Dorion stated that the fact that the petitioner was not allowed to attend the inquiry and to cross-examine the witnesses had the effect that the judicial decision to suspend the pilot was rendered *ex parte*, a decision which was full of serious consequences for the pilot: in other words, that the axiom "*audi alteram partem*" had not been followed. The Supreme Court decision in *Guay v Lafleur* (1965 S.C.R. 12) was distinguished because the investigation under the attack was of a purely administrative nature and no person's rights were affected.

Mr. Justice Dorion states that the decision rendered pursuant to subsec. 555(2) is in effect a sentence. Here, one may disagree, first, in part because a sentence is a final decision whereas, in this case, it was only a preventive and temporary measure (Ex. 1449) and not punitive, although the pilot's rights were at least temporarily affected.

This stand was confirmed by Mr. Justice Cannon who rendered the final judgment on August 12, 1965, maintaining the *certiorari* and quashing the temporary suspension (Ex. 1449(c)).

The application of the axiom "*audi alteram partem*" in temporary measures has since been the object of a recent judgment rendered by the Supreme Court of Canada in the case of *Her Majesty the Queen v Bernard Randolph and World Wide Mail Services Corporation* (1966 S.C.R. 260). The question involved was whether in the public interest, pending a final decision arrived at through the procedure set out in the Act, the Postmaster General could issue an interim prohibitory order pursuant to sec. 7 of the Post Office Act preventing the distribution of mail to a person believed to

be using the mail to commit fraud. Mr. Justice Cartwright, who rendered judgment for the Court, stated, *inter alia*,

"There is no doubt that Parliament has the power to abrogate or modify the application of the maxim 'audi alteram partem'. In s. 7 it has not abrogated it. Rather it has provided that before any final prohibitory order is made, the party affected shall have notice and right to an expeditious hearing and has defined the procedure to be followed... Generally speaking, the maxim 'audi alteram partem' has reference to the making of decisions affecting the rights of parties which are final in their nature, and this is true also of s. 2(e) of the Canadian Bill of Rights upon which the respondents relied.

The main object of s. 7 is to enable the Postmaster General to take prompt action to prevent the use of the mails for the purpose of defrauding the public or other criminal activity. That purpose might well be defeated if he could take action only after a notice and a hearing. Sub-section (1) enables him to act swiftly in performing the duty of protecting the public while subs. (2) gives protection to the person affected by conferring the right to a hearing before any order made against him becomes final.

In my opinion, the two interim prohibitory orders in question were validly made."

COURT OF FORMAL INVESTIGATION

Part VIII of the Act enables the Minister to create two Courts *ad hoc* to deal with the licences of pilots and certificated officers who, in his opinion, appear for any reason to have become safety risks.

These two Courts are administrative tribunals: charges are not laid before them, neither is competent to hear complaints regarding the commission of criminal or statutory offences under the Act, and even alleged breaches of By-laws are beyond their jurisdiction. Their findings do not preclude conviction for any offences that could be heard by a regular court. Their sole function as regards persons is to ascertain whether an officer or a pilot is a safety risk and, if so, to remedy the situation by dealing with his certificate or licence, i.e., a function that normally belongs to the Authority which issued the certificate or licence. Furthermore, the Minister may not convene any such Court unless he has reason to believe that one of the instances where such Courts have jurisdiction exists. Therefore, they can not be used merely for exploratory means or routine verification, e.g., of a pilot's professional qualifications.

The first of these tribunals is the Court of Formal Investigation (sec. 558 C.S.A. et seq.). This Court must be resorted to in cases of shipping casualties when it is intended to have the circumstances and causes established publicly and in a formal manner. It must also be resorted to in other cases not involving a shipping casualty unless the case can be dealt with through the less involved procedure provided by sec. 579 (which will be studied later). In fact, for the last fifteen years no Formal Investigation into the fitness or conduct of a pilot has ever been held when there was no shipping casualty, and the rules that were drafted pursuant to sec. 578 for holding Formal Investigations apply to shipping casualties only.

Sec. 560 authorizes the jurisdiction of a statutory Court of Formal Investigation in the following cases:

- (a) shipping casualty;
- (b) when a Master, etc., or a pilot "is charged with incompetency, misconduct or default" while serving in a Canadian ship, or while serving in a British ship in Canada;
- (c) for failure in case of collision to render assistance, or to give the necessary information to the other vessel;
- (d) where the Minister has reason to believe that, *for any cause*, the pilot or the officer concerned is unfit.

The Court of Formal Investigation could, therefore, be resorted to merely to have the facts of a shipping casualty formally established, whether or not a Preliminary Inquiry was held. In serious shipping casualties it may be felt desirable that an investigation be held publicly because in some cases there is no certainty that the complete picture has emerged, even though a Preliminary Inquiry was held, in that such an inquiry is not conducted publicly, and that the parties involved are not necessarily afforded the opportunity to bring all the evidence they thought pertinent, or to cross-examine witnesses. That procedure is proper because the Preliminary Inquiry was never intended to deal with all the circumstances of a casualty nor to determine its causes conclusively, but merely to give the Minister enough information to assist him to decide whether, with regard to safety of navigation, a more complete and thorough inquiry ought to be made to establish the cause of the accident so that proper remedial action can be taken, if necessary.

The Court of Formal Investigation also has authority to inquire into and pass upon the competency, fitness and conduct of an officer or a pilot, whether or not these questions are related to a shipping casualty. Subsec. 568(7) makes it a prerequisite of this power that, before the commencement of the hearing, the officer or pilot concerned must be furnished with a statement of the facts as they are known at that stage.

When one of these Courts passes judgment on the professional competency and fitness of a pilot, it is not bound by the standards that may be laid down in the By-laws of the District to which the pilot belongs. Such a requirement would impose an unauthorized and unwarranted limitation on the jurisdiction of these Courts and would make them subservient to the various Pilotage Authorities in their determination of the qualifications a navigator should possess to avoid becoming a safety risk. These Courts must be guided by the interests of the public and the questions they have to determine are:

- (a) is it safe to allow a pilot to continue to pilot ships in his condition;

- (b) does he lack qualifications that the Court considers he should possess, although he may meet the minimum standard of qualifications required by the Pilotage District By-law.

For example, a Court may find that a pilot is a safety risk because he lacks competency in interpreting radar images, although this is not a qualification required by By-law but which may provide sufficient grounds to cancel his licence.

When the Minister has referred a case to a Court of Formal Investigation, he is *functus officio* with the case as far as dealing with the certificates of the officers involved or the licences of the pilots concerned. The Minister remains responsible for any corrective measures that may have to be taken in connection with the other causes of the casualty, e.g., amending the rule of the road to cover a special hazard, having an obstacle removed from the channel, or adding aids to navigation at a specific place, but the decisions the Court of Formal Investigation makes with respect to certificates and licences are final and the Minister's only power and responsibility is to see that such decisions are enforced.

This tribunal is in fact a special Court of Inquiry which consists of one Commissioner, assisted by two or more assessors, or of a Board also assisted by assessors. These assessors are experts in the field that is to be investigated. It is a true court which has to sit surrounded by normal publicity and which is endowed with the normal powers of a court to summon witnesses, obtain evidence, administer oaths just like a Court of Justice, and with similar publicity.

However, it is a Court of a very special character whose jurisdiction is properly neither civil nor criminal, but is primarily of an administrative character. Although the Court is given certain accessory powers its proceedings retain the character of an investigation throughout. The Court is not asked to deal with an offence committed by a pilot or an officer but to decide whether, because of misconduct or incompetency, the pilot or the officer involved has become a safety risk to navigation. The Court is not given the powers of sentencing that belong to any court of penal jurisdiction, for instance, it can not award a term of imprisonment but can deal with the certificate or licence which escapes the jurisdiction of the penal tribunal. When it is not a question of competency but merely a case of misconduct which endangered safety on one occasion, or if the deficiency in the pilot's qualifications is, in the opinion of the Court, capable of remedy, this Court may award a suspension if this is deemed sufficient to prevent a recurrence or to correct the deficiency. In the case of a pilot (but not of a ship's officer) where it is felt that the suspension or cancellation of the licence could well be replaced in the circumstances by a pecuniary award, the Court may impose a penalty instead, in a sum not to exceed \$400 and not less than

\$50 (subsec. 568(3)). It is considered that neither a suspension *per se* nor a pecuniary penalty is a remedial power consistent with the reappraisal character of this Court (this also applies to Courts of Inquiry under sec. 579, and to the Pilotage Authority as reappraisal authority). Therefore, both should be deleted from the Act. It is considered that the Act should provide for suspension to be imposed while any impairment, whether connected with professional knowledge, physical, mental or moral fitness, is being remedied. The suspension should be lifted only if and when the pilot is able to prove that the impairment has been corrected. This will be amplified in the Recommendations.

After it renders its decision, the Court of Formal Investigation ceases to exist (unless reviewed by order of the Minister to rehear the case pursuant to subsec. 576(2)). It has no power to enforce the recovery of any penalty which has to be sought by the Crown through a regular tribunal, i.e., "in a summary manner with costs under the provisions of the Criminal Code relating to summary convictions" (subsec. 568(4)), and it becomes a statutory offence for anyone who does not deliver a certificate or licence that has been suspended or cancelled, an offence that has to be prosecuted before a regular court of criminal jurisdiction (sec. 571).

As "punishments", the Court of Formal Investigation has two additional powers:

- (a) to award the costs of investigation or any portion thereof against any party to the proceedings (subsec. 570(1) C.S.A.);
- (b) the implied right to censure, which may be deemed severe enough owing to the nature of the case and the publicity attached to the proceedings (Court of Formal Investigation into the collision between M.V. *Lawrencecliffe Hall* and S.S. *Sunek*, Mr. Justice Chevalier's judgment on Objections dated January 26, 1966, and jurisprudence therein reviewed (Ex. 1461(y)).

COURT OF INQUIRY INTO THE CONDUCT AND COMPETENCY OF OFFICERS OR PILOTS

"Where the Minister has reason to believe"

- (a) that any Master, etc., or pilot "is from incompetency or misconduct unfit to discharge his duties" or
- (b) that in a case of collision he has failed to give assistance or give the necessary information,

the Minister may cause the case to be dealt with in a less involved way by the procedure prescribed under sec. 579 rather than through a Court of Formal Investigation.

In contrast to the formal procedure, once this Court is created, the Minister, far from being *functus officio*, is part of the Court; he exercises

judicial power by rendering the verdict and awarding the sentence but he must base his decision on the facts obtained through the inquiry conducted by the Commissioner or the judge he appointed for that purpose. However, the Minister can not do so unless he is satisfied on the basis of the evidence so obtained that the pilot or officer:

- (a) is incompetent;
- (b) has been guilty of an act of misconduct, drunkenness or tyranny;
- (c) by his wrongful act or default, has caused the loss of, or serious damage to, a ship, or loss of life;
- (d) has been guilty of a criminal offence;
- (e) has been blamed by a coroner's inquest in respect of the death of any person;
- (f) in cases of collision between vessels, has failed to render assistance or to give the necessary information.

These requirements which are stipulated in sec. 579, should be interpreted restrictively: they are the only cases which justify suspension or cancellation and the procedure therein indicated is the only permissible method by which the Minister himself may deal with a pilot's licence. However, this interpretation is not to be limited to, nor affected by, the pilotage offences created by the Act and the regulations; and, contrary to the situation of the Pilotage Authority in the exercise of its reappraisal power, when it is a question of a pilot's reliability it is not necessary to lay a charge before a court or to obtain a conviction to give jurisdiction to this Court or to a Court of Formal Investigation.

The provisions of sec. 579 are extended to pilots by subsecs. 568(1)(b) and (2). This view, however, is not shared by the Department of Justice despite the fact that the pertinent texts seemed to suffer no ambiguity. Referring to the *Arrow* case (vide p. 591 *infra*) in a letter dated March 19, 1963, the Deputy Minister of Justice, without giving the grounds for his opinion, said that he was not satisfied that subsec. 568(2) rendered a pilot subject to an inquiry under sec. 579. On August 28, 1962, in the case of the triple collision between the *Calgadoc*, *Canadoc* and *Bariloche* (Ex. 1466(1)) where "disciplinary action" was contemplated against two of the Masters and one pilot, the Deputy Minister of Justice stated with regard to the pilot's case: "... it is reasonably clear, in my view, that an inquiry under section 579 does not apply to a pilot unless, of course, he is acting as the master". The obvious reason is that an inquiry under sec. 579 should never be used as an indirect method of prosecuting a pilotage offence, but only for considering a question of competency.

The procedure is for the Minister to appoint a person as Commissioner, or to direct that the inquiry be held by a judge of the Admiralty Court. The judge has the same powers as provided for the Court of Formal Investigation,

while the Commissioner has the powers of a Steamship Inspector (sec. 385) to compel the attendance of witnesses. In either case, the pilot must be given the opportunity to make his defence. The question of costs is decided by the Commissioner or the judge and not by the Minister.

This is a composite Court which proceeds in two stages: (a) the Commissioner or judge establishes the facts, (b) the Minister then passes judgment on the basis of the evidence gathered during the first stage, and decides what remedial action should be taken. The Minister has the same "punishment" powers as a Court of Formal Investigation, i.e., he may cancel or suspend the pilot's licence or assess a fine not less than \$50 or more than \$400.

SHIPPING CASUALTIES RULES

Pursuant to sec. 578, the Governor in Council has made rules for holding Preliminary Inquiries, Formal Investigations into shipping casualties and appeals thereto. They have no application to inquiries held under sec. 579, nor to Formal Investigations which do not involve a shipping casualty.

These rules are the "Shipping Casualties Rules" (P.C. 1954-1861, dated December 1, 1954) and the "Shipping Casualties Appeal Rules" (P.C. 1954-1860 of the same date, Ex. 1464(b)).

The Shipping Casualties Rules contain certain provisions which seem to be substantive law and which have the irregular effect of limiting and restricting the ambit of the provisions of the Act regarding Formal Investigations and the Evidence Act, e.g.:

- (a) defining the "statement of the case" referred to in subsec. 568(7) appears to have the effect of passing substantive law;
- (b) stating that "the statement of the case . . . shall consist of the "date, place and nature of the accident" only seems to be contrary to the intent of the legislation and not in accordance with the context. Subsec. 568(7) appears to require the pilot or officer affected by the Court proceedings be furnished with either the report of the Preliminary Inquiry (sec. 557) if one was held, or, if none was held, a statement of the case, i.e., all the facts revealed by the informal investigation on the basis of which the Minister ordered the Court to be convened.

5. THE FACTS

The actual situation is, however, altogether different from that contemplated and prescribed by the Act or Pilotage District By-laws.

The prosecution of offences or breaches of by-laws before regular courts of penal jurisdiction is never resorted to. Neither the Pilotage Authorities, nor the Department of Transport, nor the Crown, nor shipping interests, nor any other third party ever uses secs. 683 and seq. and sec. 709 C.S.A. to

enforce Part VI of the Act, or the regulations made under it. On March 3, 1966, the Chief, Nautical and Pilotage Division, Department of Transport, in an answer to a query from this Commission asking how many times in the last ten years use was made of these sections replied:

"The Pilotage section has carefully looked through all the incidents of pilot discipline handled during the last ten years. There are no instances in the Quebec Pilotage District where a charge was laid by the Pilotage Authority or by the Department of Transport, or on their behalf, or by anybody else before a regular tribunal of penal jurisdiction for an offence against or a breach of the provisions of Part VI of the Canada Shipping Act.

This also applies to other districts where the Minister of Transport is the Pilotage Authority".

As for the recovery of penalties under sec. 709, the same officer reported March 28, 1966:

"... The Minister as Pilotage Authority has not instituted any proceedings under Section 709 to recover a penalty during the last ten years" (Ex. 1466(a)).

Obviously satisfied that it had penal judicial jurisdiction over pilots, at least in cases of regulation offences, the Pilotage Authority itself settled disciplinary cases in the most informal manner, generally in complete disregard of the basic principles governing the dispensing of penal justice, except on the rare occasions when, either on account of strong opposition on the part of the pilot involved or because of the seriousness of the offence, regulation offences were referred for prosecution to a Court of Inquiry convened under sec. 579 as if it possessed penal jurisdiction. No use is made of statutory offences because District By-laws have been expanded to include them.

It appears from the evidence at the Commission's hearings that no use was made of the regular procedure provided by the Act for prosecuting pilotage offences (i.e. before tribunals of penal jurisdiction under sec. 683 and ff.) because the Pilotage Authority and its advisers firmly believed that the Pilotage Authority possessed judicial powers over pilots accused of contravening disciplinary regulations. The fact that this belief went unchallenged for years only served to encourage them in their opinion. Indeed the matter has not yet been directly questioned before a court: to date whenever there was danger of opposition, the Pilotage Authority has avoided affirming its judicial power, either by compromising on the punishment awarded, or by having the case dealt with under Part VIII.

The objections raised against the exercise of penal jurisdiction by the Pilotage Authority have borne mainly on questions of admissible evidence and the right of the accused to a full defence. Since it was thought that the problem was limited to a question of procedure, repeated and sincere attempts were made in recent years to afford an accused pilot the opportunity to be heard and to produce evidence, e.g., the new procedure introduced by the

1965 amendment to the By-laws of the larger Districts, whose main aim was to give the pilot his day in court while still taking for granted the right of the Pilotage Authority to sit as a disciplinary tribunal.

A letter written August 30, 1963, by one of the legal advisers of the Department of Transport (Ex. 1466L) fails to distinguish (a) between the prosecution of offences and the measures provided under Part VIII to enhance the safety of navigation, (b) between the Pilotage Authority and the Minister of Transport and (c) between a fact-finding investigation for the purpose of taking an administrative decision and an inquiry that forms part of a trial. The pertinent excerpts are:

"A licensed pilot may be disciplined under the Canada Shipping Act following the ship casualty for which he is found to have been at fault, as follows:

- (1) Pursuant to section 555(2) following a preliminary inquiry, by suspension of his licence until a formal investigation is held.
- (2) Pursuant to section 568, by a court holding a formal investigation, by cancellation or suspension of his licence.
- (3) Pursuant to the pilotage By-laws (in the present case, paragraph 21 of the Quebec Pilotage District General By-law) by a fine not exceeding \$200.00 and suspension or cancellation of his licence.

...

The Deputy Minister of Justice has advised the Department that under paragraph 21 of the By-law, it is necessary that the pilot shall have "the right to have notice of charges of misconduct", and the question to be determined is the extent of the information, in this connection, that should be furnished to (pilot's name) when giving him notice "to present his defence", whether to give him a complete copy of the report and of the evidence on the preliminary enquiry or to furnish him with a copy of his own evidence only.

...

Notwithstanding that there may be sufficient material in the evidence given by (pilot's name) for the Minister to find that he has violated the By-law, however, in view of the advice of the Deputy Minister of Justice and the provisions of the Bill of Rights, the undersigned is of the view that from a legal standpoint, (pilot's name) should be furnished with a complete copy of the evidence...

If (pilot's name) was advised that the Minister finds, solely on his own admissions, that he has violated the Pilotage By-law this may be contrary to the aforesaid provisions of the Bill of Rights in respect of self crimination."

Blame should not be cast upon those now charged with the application of the law and their legal advisers. They inherited an organization which they tried to improve and they were governed by an interpretation of the legislation that had been elaborated by their predecessors. With little time left free after their numerous other duties, it is normal that, as a result of the complexity and ambiguity of this outdated legislation, they failed to grasp its true meaning and tried to ameliorate a system whose basic illegality they failed to understand.

Mr. R. Macgillivray, who was Assistant Counsel for the Department of Transport when the Commission held its public hearings, provided

information about the manner in which investigations were carried out in practice, and how pilots were disciplined in Districts where the Minister is the Pilotage Authority.

He explained that there were two types of proceedings: summary and formal. A summary procedure is necessary if day-to-day happenings are to be dealt with efficiently. The policy was that minor cases which probably would not be subject to much contention were dealt with by exchange of correspondence rather than by *viva voce* hearings, but live hearings were held for the more important cases.

Disciplinary cases are dealt with in various ways depending on their degree of importance. For instance, if a pilot who has already received several warnings, is late reporting for his turn, he should be given a moderate punishment but there is no need for an extensive, formalized hearing. Some fifteen years ago it was quite normal for the District Superintendent (or Supervisor) to deal with such cases by having the pilot appear before him and informing him that he was fined fifty dollars. That was the end of the case. In other words, on minor matters the pilot was judged locally without the benefit of a hearing. The Department felt that this system worked very well.

However, when more interest was taken in civil liberties it was recognized that pilots must be guaranteed an opportunity for defence. One development was the introduction of the "show-cause" procedure. When dealing with minor offences the District Superintendent notified the pilot telling him the nature of the complaint and the particulars, forwarding a statement of the available information and adding that it was planned to impose a penalty. This could be done by correspondence (for a case dealt with in this way in December 1964, vide Pilotage District of Quebec, *Discipline*) or verbally by having the pilot appear before the Superintendent. If the pilot admitted the truth of the allegation and agreed that he had violated the By-law, punishment was awarded by the Superintendent, provided he had such power under the By-law and felt that his powers to punish were adequate. If the pilot admitted the truth of the allegation but denied that it was a violation of the By-law, he was permitted to present an argument on the legal question as well as a statement in mitigation. On the other hand, if he denied the truth of the allegation he was allowed to produce evidence. If the pilot requested that any witnesses who gave a written statement be called, the request was granted if it was practicable to do so. In such a case, the Superintendent allowed a reasonable adjournment for the purpose of calling these witnesses and any other witnesses the pilot might wish to produce. It was the policy that before the Superintendent refused such a request he normally referred the matter to headquarters for advice from the legal advisers of the Department.

Mr. Macgillivray admitted that the Superintendent has no statutory authority to compel the attendance of any witness except the pilots under the By-law of his District. When asked what would happen if a pilot appearing before the District Superintendent requested the appearance of the complainant whom the Superintendent could not compel to attend and whether the case would be dismissed if the complainant did not appear, he could not say what decision would be taken because this was a hypothetical situation that had not yet occurred.

A pilot's refusal or failure to appear before the District Superintendent when duly ordered to do so to answer a charge is considered an admission of guilt. The Superintendent would then proceed and assess whatever "penalty" he felt suitable within his powers. It is noted that under this procedure, contrary to the principles of the administration of penal justice, a pilot is considered guilty of an offence as charged unless he is able to establish his innocence, and that in *ex parte* proceedings the truth of an allegation need not be established at all.

Cases of a more serious nature are referred to the Pilotage Authority, either because the By-law so specifies (e.g., use of liquor or drugs, shipping casualties), or because the Superintendent feels his powers of discipline are inadequate in the circumstances.

Mr. Macgillivray mentioned another extraordinary feature of the disciplinary process: a sentence awarded by a District Superintendent is not necessarily final but may be increased by the Pilotage Authority if it is felt that the punishment awarded is insufficient. He explained " . . . I think that the attitude has been that it is up to the Minister to overrule the Superintendent if he assesses a penalty which the Minister thinks has been improperly assessed". He was not certain whether a sentence imposed by the Superintendent would be invalidated if, in awarding it, he had not followed instructions received from Ottawa.

The other alternative was for the Minister as Pilotage Authority to deal with the case in Ottawa himself. The whole trial then had to be conducted by correspondence by means of the show-cause letter procedure. The Minister as Pilotage Authority with the information made available to him, either through a Preliminary Inquiry under sec. 555 C.S.A. or through an informal investigation carried out either by local representatives of the Pilotage Authority or by the Department of Transport Investigation Officer or both, had a show-cause letter sent to the pilot. The pilot was told that from the information received it appeared he was guilty of a stated offence but, before punishment was awarded, he was invited to present his defence in writing if he wished, i.e., an argument and possibly additional evidence through affidavits, or, alternatively, to appear in person before the Superintendent (examples of such show-cause letters dated August 11, 1964 are filed as Ex. 1364). The original wording of the show-cause letter was modified in order to remove

any suggestion that the matter had been adjudged on the basis of the evidence already in hand. Mr. Macgillivray agreed that this procedure deprived the pilot of his right to cross-examine witnesses but he added the Department was fairly confident that, if a pilot felt he was being seriously prejudiced by his inability to cross-examine, he would say so and ask for a hearing. However, the show-cause letter did not tell the pilot he had this choice.

Mr. Macgillivray admitted that there is no machinery for the Pilotage Authority to investigate disciplinary matters, that it is incapable of arranging a trial, since it can not compel witnesses, and that when such action becomes necessary because the argument put forward by the pilot is so forceful, the Pilotage Authority has to go through the Minister in order to benefit from the extraordinary powers he derives from Part VIII. Mr. Macgillivray added that when people became more conscious of their civil rights and objected to the procedure for disciplining pilots that had been followed up to that time, it was recognized that the Department would have to find another method to replace the show-cause letter procedure of giving the pilot a hearing. He said that it would be unlikely that a pilot "would be content with" the type of informal hearing provided by the show-cause letter procedure where he is unable to cross-examine witnesses and that, in fact, in such cases the accused pilots raised such strong objections that the Pilotage Authority felt itself incapable of dealing with them under its own powers. On the other hand, a hearing held under sec. 579 C.S.A. by a Court of Inquiry gave the pilots an opportunity to produce their own witnesses. He stated that consideration had been given to amending the By-laws in each District but, instead, it was felt that "since the situation is now under review by a Royal Commission, to come up with something brand new would not be advisable", and the Department preferred to wait until the Commission's report was received. However, as noted earlier, the disciplinary provisions of the By-laws were substantially changed in 1965 in order to provide pilots an opportunity to be heard, whether cases were dealt with by the District Superintendent or by the Pilotage Authority.

On March 29, 1961, a set of proposed instructions regarding investigations and disciplinary measures was sent from the Department in Ottawa to some Superintendents and Supervisors. These instructions never came into force, possibly on account of the new policy they enunciated that in the St. Lawrence Region disciplinary cases would be dealt with by the Regional Superintendent instead of the District Supervisors, and possibly also because the proposed system clashed with many of the basic principles of the administration of penal justice without any supporting provision in the Act.

The main features of the proposed instructions were (Ex. 1363):

- (a) All cases of misconduct were to be reported to the Regional Superintendent.

- (b) Minor incidents or minor breaches of By-laws were to be dealt with summarily by the Regional Superintendent but an appeal lay with the Pilotage Authority. The summary trial procedure was described as follows: "When the pilot appears, the Regional Superintendent will explain what offence is alleged and the basis on which he considers it proven. If the pilot admits the offence or, having denied it, fails to satisfy the Regional Superintendent that there was no violation, the Regional Superintendent will impose such fine as he deems appropriate, not exceeding forty dollars."
- (c) More serious cases were to be investigated by the Regional Superintendent: "If possible, he should take sworn statements from all such persons who are not likely to be available to testify in person at the hearing". The Regional Superintendent's investigation was to be completed even if a Preliminary Inquiry was also held. In this event the two investigations were to be carried out simultaneously. The pilot was to be warned, if his testimony was given under oath, that it might be used against him at any subsequent hearing.
- (d) Upon receipt of the Regional Superintendent's investigation report, the Ottawa headquarters had to decide whether to take disciplinary action and, if so, whether to have the matter dealt with by the Regional Superintendent or by the Minister pursuant to sec. 579 C.S.A.
- (e) If the case was referred to the Regional Superintendent and the pilot pleaded not guilty "he will be shown the statements of the witnesses and documentary evidence" gathered by the Regional Superintendent during his investigation and "given the opportunity to refute this evidence by presenting written statements, calling witnesses and giving a testimony in his own behalf and to present any argument on the legal question involved . . . ". No decision was to be taken by the Regional Superintendent in such an eventuality without first obtaining the opinion of the department's Law Branch. At any time the Regional Superintendent could, if he considered the ends of justice would be better served, recommend that there be a hearing under sec. 579 C.S.A. If the pilot did not appear and did not plead in writing "he shall be deemed to have admitted the violation of the By-laws".
- (f) If at Ottawa headquarters "it is decided that the matter should be dealt with by the Pilotage Authority without a hearing" the "show-cause letter" procedure was to be resorted to.
- (g) Cases of a more serious nature were to be dealt with by the Minister under sec. 579. Reference the nature of the evidence, it was

stated that "the legal adviser shall introduce statements taken from witnesses who are not available to testify in person; preferably such statements shall be produced by the Regional Superintendent who may be questioned concerning his impressions as to the credibility of the witnesses".

It must be observed that, *inter alia*, these proposals show a misconception of the nature and purpose of the Minister's powers pursuant to sec. 579 of Part VIII of the Act because they are clearly being used to enforce discipline and as a means of enforcing punishment for statutory offences or breaches of regulations. Furthermore, under the proposed procedure (except in cases dealt with under sec. 579 C.S.A.) the pilot is found guilty even before he is charged and, moreover, on the basis of evidence not admissible before a court of justice. In cases attended to by the Regional Superintendent, the judge is not only the prosecutor but also the person who, *ex parte* prior to the trial, has ascertained the facts and has arrived at the conclusion that the accused pilot is guilty of the offence with which he is charged. The accused is tried by a prejudiced and biased judge and the fact that the offence may not be serious in the eyes of the Pilotage Authority or its local representative does not alter the situation.

Throughout his testimony, Mr. Macgillivray used the words "Department", "Pilotage Authority" and "Minister" indiscriminately to mean one and the same thing. He explained that when such a hearing is held "it is pretty hard to say that anybody other than the Pilotage Authority is the judge". He considered that this was a defect in their procedure. That type of hearing was used only to gather evidence and it was always made clear that the person in charge of the inquiry was not making any judgment and that the decision would be made by the Pilotage Authority.

However, he was aware of the distinction, which was brought to their attention by the Department of Justice, that the Minister as Pilotage Authority is not the Minister of Transport. He is *persona designata* as Pilotage Authority but when he acts under sec. 579 he is not acting as Pilotage Authority. Mr. Macgillivray believed that it would be desirable if the wording of sec. 327 was amended to ensure that the Minister never operates in two distinct capacities by providing that, where no local authority is appointed, the functions of the Pilotage Authority shall be performed by the Minister of Transport. It is considered that if this provided any solution, it would apply to only part of the problem and the problem of the other Pilotage Authorities would remain unsettled.

Mr. Macgillivray also admitted that it was questionable whether sec. 579 could be applied to enforce discipline on pilots. This section provides that the Minister may cause an inquiry to be held when he "has reason to believe that any master, mate or engineer (or pilot) is from incompetency

or misconduct unfit to discharge his duties . . . ”. The word “misconduct” was used apart from its context and in its general sense to mean any breach of discipline without considering whether the pilot was thereby rendered unfit to discharge his duties. Mr. Macgillivray agreed that they might “have been stretching the words” when they used sec. 579 for the type of hearing they required for a case important enough to warrant serious disciplinary measures.

As for the procedure followed at a hearing held under sec. 579, when a person has been appointed to hold such an inquiry a statement of the case is sent to the pilot concerned together with a summons to appear. Then the hearing is held with the pilot present and represented by counsel. The inquiry officer, as required under the Act, is advised by a legal assistant who calls all the witnesses and produces all the evidence he possesses. The pilot, through his counsel, may adduce further evidence and also cross-examine any witnesses produced by the Department.

Under this procedure the Minister once investigated the case of a pilot charged with the regulation offence of drunkenness while on duty. The case was heard and it was found that there was not enough evidence to support a charge before a regular court and the matter was dropped at that stage (vide Pilotage District of Quebec, *Discipline—the Arrow Case*). Mr. Macgillivray conceded that this case did not fall within the type of misconduct foreseen in sec. 579 but the Department was endeavouring to find some means in the Act for providing a hearing without becoming involved in the complications of a Formal Investigation. The Department of Justice advised subsequently that there was doubt about the applicability of this section to the discipline of pilots and, therefore, the Department of Transport stopped using it. As seen earlier, a Court of Formal Investigation has no greater competence to hear a trial regarding the commission of a statutory or by-law pilotage offence. Its only jurisdiction is to decide in the cases enumerated in subsec. 568(1) whether the pilot in the cases defined in paragraphs (a), (b) and (c) is deemed to be a safety risk and, if so, to order the proper remedial measure. A finding by such a court that a pilot “has been guilty of any gross act of misconduct, drunkenness” does not amount to a conviction of a statutory or regulation offence. A finding by a Court of Formal Investigation (and by a Court of Inquiry under sec. 579) is not a bar to prosecution for an offence before the regular courts, any more than a judgment rendered by a civil court condemning a pilot to pay the damages he has caused by his wrongdoing would be a bar to prosecution before a penal court if the wrongdoing also happens to be an offence. A plea of “autrefois convict” or “autrefois acquit” based on the finding of a Court under Part VIII will be rejected because the jurisdictions of these Courts are not of the same nature.

To illustrate the true legal situation under the Canada Shipping Act a shipping casualty caused by a pilot impaired by alcohol will give rise to the following recourses:

- (a) Civil claims v the pilot before a court of civil jurisdiction for the full damages caused by his wrongdoing, the limitation of pecuniary damages of subsec. 362(2) C.S.A. not applying to gross negligence.
- (b) Reappraisal of the pilot's reliability by a Court of Formal Investigation, if the Minister of Transport so decides, which may result in the loss of the pilot's licence if he is found to be a safety risk (secs. 560 and 568). Sec. 579 does not apply to shipping casualties as such.
- (c) Prosecution of the pilot before a tribunal of criminal jurisdiction for the commisison of a statutory indictable offence listed in sec. 369.
- (d) Preventive suspension of the pilot's licence under sec. 370 pending the outcome of a charge laid under sec. 369.
- (e) Reappraisal by the Pilotage Authority of the pilot's physical fitness pursuant to regulations made under subsec. 329(j); if it can be established that he is incapacitated by habits detrimental to his usefulness as a pilot, he may be retired. But the Pilotage Authority has no reappraisal power over reliability if the pilot is convicted of an offence under sec. 369 because surprisingly, sec. 370 does not provide for such action (vide pp. 344 and ff.). The end of the criminal trial automatically ends both the preventive suspension and the power the Authority has over the pilot's licence under sec. 370.

Except for preventive suspension (d) which is dependent upon prosecution of the offence of sec. 369 C.S.A., the four other courses of action are distinct and may be exercised at the same time.

Mr. Macgillivray added that, to the best of his recollection, a hearing under sec. 579 was not a public hearing (while a Formal Investigation is always a public hearing (subsec. 566(2))) but a matter between the Pilotage Authority or the Department and the pilot. Therefore, other counsel such as those representing the shipowners should not be heard at all except as counsel for witnesses. He was not sure, however, that that policy was always followed since there were no firm rules of procedure laid down for inquiries under sec. 579; the reason for this policy being that an inquiry of this type is not into a casualty, as such, but into the conduct of a pilot.

The principal problem of the Department in connection with pilots' discipline had been to try to ensure that the pilot had a fair hearing. They recognized that upon occasion the Investigating Officer (who carries out an

informal investigation and whose report was used as evidence in the show-cause letter procedure) did not give the pilot an opportunity for cross-examination but there is a time element involved and some witnesses had to be contacted while they were still available. Hence, D.O.T. tried to arrange for a summary hearing in cases where the ship involved would be leaving Canada shortly, because one of the duties of the Department is to keep ships moving. They believed that this aim could be attained by the appointment of a Wreck Commissioner, i.e., someone who would always be available to initiate and hold a Preliminary Investigation at a convenient time and place.

They made efforts to have disciplinary cases investigated without delay by appointing a Regional Superintendent for the St. Lawrence Region. Previously the passive attitude of the local representative of the Pilotage Authority was the main cause of failure to enforce discipline for lack of proper evidence (vide Pilotage District of Quebec). The main difficulty encountered was late reporting. A complaint concerning a pilot boarding a ship under the influence of liquor often came to the Department's knowledge, long after the event, by the ship's agent sending a copy of the Master's letter to him giving the particulars, and sometimes accompanied by affidavits. It is very seldom that they are able to obtain witnesses from a ship for a trial and, there being no other evidence available, they can not proceed with the prosecution of the offence for lack of evidence.

Mr. Macgillivray explained that one of the weaknesses of the disciplinary procedure as provided in the By-laws was that the accused did not appear in person before the Authority. Over the years they endeavoured to give a pilot as fair a hearing as possible having due regard to the circumstances, the frequent delays before cases come to the attention of the Pilotage Authority and their desire not to delay ships. The two main factors are: the time element, as far as witnesses are concerned, and the remoteness of the Pilotage Authority.

Mr. Macgillivray reminded the Commission that when Pilotage Authorities were first set up under the law they were local bodies who devoted most of their time to pilotage, but where the Pilotage Authority is the Minister of Transport he has a great many other functions to perform; he added that it is quite clear that, except in the most important cases, it is unlikely that the Minister can give his full personal attention to matters other than reports from his officers. In other words, the situation that exists now was never contemplated by the law.

Observing that the Minister as Pilotage Authority is so busy, Mr. Macgillivray was unable to give any reason why advantage is not taken of the power to delegate by by-law, under subsecs. 327(2) or 329(p). He suggested that disciplinary powers were not delegated because the local Supervisors would be placed in a position for which they were unprepared, and which did not conform to their other functions. He also added that: "an

honest effort was made to find a means of giving the pilot a hearing . . . the Department does not consider that there is now a satisfactory system for dealing with infractions” and they are anxious to find a solution.

Captain Jacques Gendron, who was, in turn, Regional Superintendent for the St. Lawrence Region and Investigation Officer for the Department of Transport at Ottawa, gave a factual account of how the disciplinary problems of pilots are handled by both the Pilotage Authority and the Department of Transport.

For a shipping casualty where a pilot was involved, the procedure was for the local Supervisor or, in his stead, the Regional Superintendent, to make his own fact-finding informal investigation and to forward his report to Ottawa together with the pilot's casualty report. At Ottawa Headquarters an involved and complex process then took place. When a casualty report was received it was passed to the D.O.T. Investigation Officer to study and recommend what further action, if any, was indicated. When he reached a conclusion, the file, together with his opinions, considerations and recommendations, was passed to his immediate superior, the Superintendent of Pilotage. He similarly studied the file and made his own recommendations to the Chief of the Nautical and Pilotage Division. He, in turn, did a similar study, added his own recommendations and then passed the file to the Director of Marine Regulations. And so on up the hierarchy. The final decision on which recommendation to adopt was made, either by the Assistant Deputy Minister, or by the Deputy Minister and, on occasions, by the Minister himself. When this final decision was reached it was referred to the Superintendent of Pilotage for implementation. If the Pilotage Authority decided to punish a pilot, the normal procedure was to send a show-cause letter to the pilot concerned, but this procedure was not followed in all cases. On occasion the pilot involved simply received a letter to the effect that he was suspended. In neither case was the pilot provided with the full record, not because the Department objected, but only because it was not the procedure. If, however, the pilot so requested, he was shown the full record.

When disciplinary measures were taken by the Minister of Transport under Part VIII, he convened either a Court of Formal Investigation or a Court of Inquiry under sec. 579 C.S.A., unless he felt unable to do so because he considered his information incomplete. In that case, a Preliminary Inquiry was first ordered. In fact, this was the rule, and it was only in exceptional cases that a Formal Investigation was ordered in the first instance.

When disciplinary matters were handled by the Pilotage Authority, the Minister never sat as a tribunal. At times, the procedure followed was to send a show-cause letter to the pilot advising him that information received indicated he had been remiss in his duty, and that it was intended to take disciplinary action unless he proved that he was not at fault. However, Capt. Gendron recalled that sometimes when the investigation showed a pilot

was to blame, a show-cause letter was not sent to him and punishment was applied without further warning. In his opinion, there was no established pattern, "we were jumping from one case to the next without any actual rule laid out as to what to do in what circumstances and what procedure to follow". In some cases, the Authority would decide to send a show-cause letter and in other cases no letter was sent. Whether or not the pilot was present throughout the investigation had no bearing on this decision.

During his term of office as D.O.T. Investigation Officer (from Dec. 1961 to July 15, 1963), Capt. Gendron held a number of informal investigations, conducted one Preliminary Inquiry in a case where no pilot was involved, and sat once as the Inquiry Officer under sec. 579 C.S.A.

When a Formal Investigation was held, the Commissioner appointed for that purpose notified all the witnesses and all the persons concerned. He was normally assisted by a counsel from the Department. The pilot(s) involved, and even some of the witnesses, were assisted by legal counsel. The witnesses were examined and cross-examined and all parties were given an opportunity to put questions.

When the purpose of the Court (either Formal Investigation or Inquiry under sec. 579) was to investigate the conduct of a pilot, the statement of the case, which accompanied the appointment of the Commissioner, stipulated that the investigation was only to inquire into the conduct of the pilot. According to the practice followed, when a Master was asked to give evidence he was informed that his own conduct was not under investigation and that his testimony was merely for the purpose of helping the Pilotage Authority. This procedure was followed, *inter alia*, in the Formal Investigation conducted by Captain M. D. Atkins regarding the grounding of the vessel *G. N. MacWhirter* in 1963.

After a few months' experience at Headquarters in Ottawa, Captain Gendron formed the opinion that the process of decision-making following investigations on disciplinary matters was laborious, involved too many unnecessary people and caused much delay in enforcing discipline.

The recommendations at various levels contained divergent opinions, e.g., at times the Chief of Nautical Services did not agree with the recommendations Captain Gendron had made because, he explained, he knew the waters and could not agree with Captain Gendron's findings. It was suggested that a poor impression was created if officers of the Department contradicted each other, and that it would be an improvement if they formed a committee to discuss any casualty so that they could pool their experience by a meeting of nautical minds.

A committee was then set up in Ottawa composed of a group of D.O.T. officers sitting as a Board of Review. The intent was that this would relieve five or six senior officials of the responsibility of making their own

reviews and appraisals of each case, and that the Board of Review's findings and recommendations would serve as the basis for immediate decision by the Deputy Minister, thereby considerably curtailing delays.

This committee was unofficial and its functions were not defined in writing. It was not a court, and had no legal power, it could not hold an investigation by itself, and had no power to call any witnesses or to accept any representations. If the committee felt that further investigation was needed, the case would be referred back to the Investigation Officer with the request that the investigation be reopened, or a recommendation would be made to the Minister to have the case investigated by a Preliminary Inquiry. If the information available was considered complete, the committee recommended the action that should be taken.

The committee sat three times during Captain Gendron's term of office in Ottawa but it did not come up to his expectations. Delays were not shortened because, in spite of the committee, the old procedure continued to be followed. The committee had to forward its findings to the Chief Nautical Services who, instead of merely forwarding the file to his superior, continued as before to make a fresh review of the case, to insert his own remarks and recommendations. The process was repeated as before until the file reached the Deputy Minister through the usual chain of command, Officers at each level reviewing the case, making their own recommendations and ignoring the committee's intended function.

When Captain Gendron left the employment of the Department of Transport on July 15, 1963, the delays had not been cured, e.g., the case of a pilot involved in the *Sarniadoc*¹ accident was still pending after eight or nine months, the *Timna* case was undecided after a year and a half or two years and there had been a delay of a year and a half regarding the pilot involved in the *Arrow* incident.

Captain Gendron was of the opinion that the whole system of inquiry and discipline needed to be renovated. He felt that the system should not be operated by either the Pilotage Authority or the Department of Transport but that the procedure should be clearly stated in official rules and regulations and that the decisions arrived at should be enforced. He had the opportunity to attend some of the investigations into marine casualties carried out by the United States Coast Guard and he was greatly impressed by the publicity given to the hearings and findings as well as by the orderly procedure that was followed.

For examples of actual cases where the Pilotage Authority discharged its surveillance and reappraisal duties and enforced discipline of pilots, and for the extent of the use made of these powers, reference is made to the

¹ The Commission was informed in July 1966 that the pilot of the *Sarniadoc* was suspended for one month but that the other two cases were not pursued after objections by the pilots' counsels.

summing up of the evidence in the other Parts of the Report dealing with Pilotage Districts, particularly the Quebec District where these questions are given special consideration. The situation may be summed up by saying that, in general, the pilots are well disciplined and highly competent, and that the Pilotage Authorities have very few occasions to make use of their reappraisal powers and to resort to disciplinary measures. However, on the rare occasions when they must act, the process becomes involved and time-consuming because of the illegality of the procedure followed. Often, especially in the more serious cases, the Pilotage Authority finds itself powerless to enforce discipline, or to prevent a pilot who has become a safety risk from continuing to practise his profession.

COMMENTS

(a) Passive Attitude of Pilotage Authorities

It is considered that the new pilotage legislation should enable each Pilotage Authority to discharge its responsibilities fully and play an active, positive rôle in maintaining the qualifications of its pilots at the highest level, even if this entails the organization and support of pilot schools and training programmes afloat. To meet the challenge of modern technological and navigational developments, Pilotage Authorities should receive every encouragement from the Federal Government to train their pilots in modern techniques. However, sound legislation and adequate organizational structures are valueless if effective use is not made of them. It is a reasonable assumption that, if the service was founded by private organizations competing against each other for pilotage clientele, they would long since have taken the necessary steps to keep the competence of pilots in line with technical progress, if for no other reason than to meet competition and remain in business. In this field, mediocrity should never be tolerated, particularly when pilotage is administered by the Crown.

Although the chaotic situation that now exists may be chiefly attributable to inadequate legislation, it is considered that the problem could have been wholly, or at least partially, solved if Pilotage Authorities had not adopted the negative, passive attitude too often indicated by the record. The situation may become even more confused because both the pilots and the shipping interests may consider themselves forced by the situation thus created to strengthen their organizations in order to achieve positive results. Matters will not improve unless Pilotage Authorities assume all the responsibilities entrusted to them by Parliament. They must give direction to the service and take decisions without procrastinating or waiting for events to dictate action. In the field of safety, they must be active and progressive, and not delay until a disaster occurs before coming to grips with local problems. Pilotage Authorities must make a continuous effort to keep pilots' qualifications consonant with technological progress by making their own inquiries

and studies, by planning in advance and not remaining satisfied with compromise solutions negotiated by the immediately interested parties who have their own interests and not those of the public mainly in mind.

The field of safety and discipline provides a good example of the prevailing situation. In the last ten years, at least, no charges have been laid against pilots for committing any of the statutory offences listed in part VI of the Act, but it would be unrealistic to believe that none of these various offences was committed anywhere in Canadian pilotage waters during that period.

With regard to the use of alcohol by pilots (a danger of which Pilotage Authorities should be extremely conscious), perusal of the record of cases of drunkenness when on duty or habitual drinking shows how little awareness Pilotage Authorities seem to have had of their responsibilities towards the public. For example, in the Quebec District during a brief period, two pilots were refused at Father Point by the Masters of vessels on account of alleged drunkenness (May 9 and August 21, 1959). In the first instance, no remedial action could be taken because the case was mishandled by the Pilotage Authority's local representative at Father Point. It would seem logical that the Pilotage Authority would react sharply and issue precise instructions to cover a similar occurrence; at least, to instruct its representative to meet pilots on return to ascertain their condition at the time. However, when the second incident occurred three and a half months later, the same local representative at Father Point remained as passive as before; he did not even meet the pilot personally, but was satisfied to speak to him by telephone. Again, as might be expected, the second case failed due to lack of evidence. (For details, vide Pilotage District of Quebec, *Advisory Committee*.) The cases of ex-Pilot Drapeau and Pilot No. 70 are similar instances (vide Quebec District, *Discipline*). Despite lessons that might have been learned by experience, no instructions were issued to local supervisors and persons in charge at boarding stations.

It is considered that the major single cause of this state of affairs was departing from the basic, realistic principle of decentralization of administration. Through the device of appointing the Minister of Transport as Pilotage Authority for each of the larger Districts, their pilotage organizations were centralized in Ottawa within the Department of Transport. The isolation of the Pilotage Authority from pilotage operations, combined with administration by remote control, caused immediate dissatisfaction, e.g., the situation in the Quebec District in 1913 prior to the Lindsay Commission (vide Pilotage District of Quebec, *History of Legislation*). Failure to decentralize administration even by delegation of power to local staffs, lack of effective contact between the pilots, the users of the pilotage services and the Pilotage Authority, caused an unhappy situation to go from bad to worse. It still remains unsatisfactory. The record shows that in the few Districts where administration is most efficient, the Pilotage Authority's local representatives

are well qualified and do not hesitate, forced as they generally are by inadequate legislation, to assume responsibilities which, at times, exceed the powers they legally possess.

If Pilotage Authorities and the Department of Transport had realized the nature and extent of their responsibilities, they would have been alerted by their inability to control the situation because of their lack of power, particularly in the face of ever increasing obligations. They should have sought the necessary powers of control from Parliament but they failed to do so and continued (presumably not wishing to become more involved) to administer the public service that pilotage had become, by negotiation and compromise rather than according to law. This situation is wholly incompatible with the protection of public interest and efficient administration.

(b) Strikes by Pilots

A strike by pilots is the greatest calamity that can befall the pilotage service. Simply because a small group of people refuse to perform their duties, navigation in the area affected comes to a near standstill to the great inconvenience of the shipping interests and to the prejudice of the public in general. A strike by pilots, as in other professions or trades, is a show of force which is normally adopted as a last resort when the parties involved have lost confidence in, and respect for, each other and the positions they have taken appear irreconcilable. As soon as those who provide a service consider their working conditions unjust and believe that a strike is their only means of effecting a solution, it may be expected that they will resort to such action. In an area where pilotage is of great economic importance, the creation of a Pilotage District produces a monopoly in the hands of a few. In such circumstances, strike action becomes a disproportionate weapon which could easily be employed to gain private advantage to the prejudice of public interest. Unusual hardships fall upon the general public when pilotage services are withheld and no alternative exists.

The right to strike by those employed in a public service can be justified only when the alleged injustice to be corrected is commensurate with the loss and inconvenience the stoppage of work entails. Today—and even less in the future—it is difficult to conceive of circumstances that would justify prolonged strikes by pilots in most Pilotage Districts.

Strikes are not new in the pilotage service, but the 1962 strike by the St. Lawrence River pilots was the first of its kind. All previous strikes by pilots were confined to one District, whereas the 1962 strike embraced the three St. Lawrence River Districts and threatened to become national in scope when the B.C. and Saint John, N.B., pilots, who shared some of the same problems, declared their intention of joining in. The appointment of this Royal Commission to investigate pilotage problems was one of the conditions of settlement.

Without making a special effort to list all the strikes that have occurred in the pilotage service in Canada, the Commission's studies have revealed a considerable number, and there may have been others. A spectacular strike was waged by the Montreal pilots in 1898 when the Senate voted down their private bill which had already been approved by the Commons. This bill was the last of a series of fruitless attempts during the previous sixty years to gain control of the management of the pilotage service through incorporation, a privilege which the Quebec pilots had enjoyed since 1860. The appointment of a Royal Commission was also one of the conditions of the settlement of that strike. In the Miramichi District in 1899, the twenty pilots on strength refused to accept reduced rates fixed by their Pilotage Authority and resigned *en masse*. In 1919, the B.C. pilots walked out in protest against the implementation of the recommendations of the Robb Royal Commission which had resulted, *inter alia*, in the amalgamation of all coastal Pilotage Districts (except New Westminster) together with a substantial reduction in pilotage rates. This the pilots refused to accept. The Government reacted by abrogating the B.C. District, with the result that the pilotage service remained unorganized until the District was recreated in 1929 following another Royal Commission. There have also been strikes in other Districts, e.g., the strike by the Kingston District pilots in 1957 and in other forms, e.g., the Quebec special pilots once reacted against a decision of the shipping interests to reduce the special service bonus by refusing to act as special pilots, thus forcing the companies concerned to take pilots from the tour de rôle. There have also been a number of occasions when threatened strikes were narrowly avoided.

Strikes by pilots have always been illegal in Canada under pilotage legislation. One of the conditions for holding a pilot's licence is that the pilot must be available for duty unless prevented by some physical impairment. Most District By-laws contain a provision to that effect. Prior to 1934, it was a statutory offence for a pilot not to take an assignment when required to do so by the Master of a ship or by the Pilotage Authority. Despite all this, strikes have occurred repeatedly and no disciplinary action has been taken against any of the pilots involved. Furthermore, when a strike occurs, the general attitude taken by the authorities is to avoid involvement. In the 1962 strike by the St. Lawrence River pilots, the Pilotage Authorities concerned refrained from despatching pilots as soon as they were notified that the pilots were on strike and, therefore, technically the pilots committed no offence.

As seen in other spheres of activity, the fact that strike action has been outlawed for certain groups has not prevented strikes from occurring and almost invariably this flagrant violation of the law has been condoned by those in authority by their failure to take the punitive sanctions provided to enforce the legislative prohibition. Strikes may be outlawed but their occurrence can not be prevented. The best of laws can not replace the moral

conscience of individuals and groups. However, it is the responsibility of the legislature concerned (for pilotage the Parliament of Canada), to ensure that the vital interests of the public are protected.

The Shipping Federation of Canada has recommended that the right to strike be denied by the Act and, therefore, that strikes by pilots be made illegal. However, each clash does not affect the interests of the public with the same intensity because the importance and necessity of pilotage as a public service varies from place to place. Therefore, a general prohibition may not be warranted. It is considered that this is a point on which the Commission should refrain from making a recommendation. The question whether those providing a public service should be given the right to strike has been under consideration by Parliament and by the Government for many years and this Commission can not offer any new material of which the Government has not already been made aware. Reference is made, *inter alia*, to the report of the Preparatory Committee on Collective Bargaining in the Public Service (Heeney Report) and the legislation that ensued, i.e., the Public Service Staff Relations Act (14-15-16 Elizabeth II c. 72), the 1967 amendment to the Financial Administration Act (14-15-16 Elizabeth II c. 74), and the Public Service Employment Act (14-15-16 Elizabeth II c. 71). Nevertheless, every reasonable step should be taken to prevent strikes by pilots, particularly in view of the disproportionately disastrous consequences a prolonged strike would entail in a District where the service is essential. It is believed that the remedy does not lie merely in a legislative prohibition but, primarily, in legislation which provides an adequate organizational system where the causes of conflicts are reduced to a minimum, and where adequate mechanisms are provided to permit all those concerned to defend their rights and obtain redress of their grievances. At the same time, this legislation should ensure that, if a strike occurs, minimum services continue to be provided in Districts where pilotage is essential. Secondly, pilotage should be under the direction of competent persons, fully aware of their duties and responsibilities. They must bear in mind the fact that it is not sufficient to take the right administrative decisions, but it is also most important for the Authority to retain the confidence of both pilots and shipowners and, hence, every effort must be made to convince those involved of the correctness of decisions.

Pilots are educated, responsible persons and should be treated as such. Many of them were required to hold a Master's Certificate of Competency as a prerequisite to receiving their pilot's licence and, in addition, were in command for a number of years before becoming pilots. They are, therefore, experienced in the function of management and trained to take reasoned decisions. Such men will not be content with the dictates of authority, will resent arbitrary decisions, and will refuse service when they are convinced they are being mistreated, as the background of most strikes has shown (*vide, inter alia*, Montreal District, *History of Legislation*, 1898 strike;

Quebec District, *Pilots' Status and Working Conditions*, threatened strike in 1960 and the 1962 strike).

However, despite the best of legislation, adequate organization and strenuous efforts by a competent authority to appeal to reason, there is always the possibility of some failure in the system or of some irrational strike action taken as a means of coercion to extract unjustified advantages. Therefore, whether or not strike action is outlawed or restricted, the possibility of a strike occurring must be covered in legislation.

First, the Act should give Pilotage Authorities the necessary powers to provide reasonable service through alternative plans that can be implemented if a strike occurs, e.g., power to use the services of any Master, officer, former pilot or person whom the Pilotage Authority concerned deems competent; power to arrange convoys under the guidance of a qualified person in the leading ship or under the guidance of a Government ship, i.e., a Coast Guard or R.C.N. vessel. There may also be many other plans made possible by modern technology. An alert Pilotage Authority, conscious of its responsibility towards the public, should always have a reserve number of alternative plans especially conceived to meet the District's needs which could be put into effect as soon as a strike takes place. All costs incurred by the Government and by the Pilotage Authority in the implementation of these plans should be considered administrative expenses of the District.

The aim of such alternative plans is not to break the strike but to protect the public by reducing its otherwise disproportionate consequences. The best alternative plan will always remain a makeshift, temporary measure. In a District where pilotage is a necessary public service, substantial inconveniences will always be experienced because there is no adequate substitute for an efficient pilotage service.

Second, as previously suggested (vide C. 3, p. 43), another way of alleviating the consequences of a strike is to facilitate navigation in pilotage waters so that ships may proceed without pilots, although at some inconvenience, e.g., improvements to channels and efficient aids to navigation. Thus, at the worst, traffic would be delayed but not completely interrupted, except under very adverse conditions. Study of the traffic during the 1962 strike by St. Lawrence River pilots (vide Quebec District, *1962 Pilots Strike*) shows that trips were made by many ships without pilots at a time when a great number of aids to navigation were not even in place. It is considered that with active assistance from Pilotage Authorities and the Government, regular traffic might have been maintained, except possibly for those few days when adverse weather conditions prevailed.

Chapter 10

PILOT FUNDS

PREAMBLE

A “pilot fund” is the instrument provided by the Canada Shipping Act to enable Pilotage Authorities to extend financial assistance to pilots in need or to the dependents of deceased pilots. In practice, this term is not used but, characteristically, the term “pension fund” is employed instead as if both were synonymous. Pension funds, which are purportedly created under the statutory provisions governing pilot funds, normally exist only in the larger Pilotage Districts; generally speaking, they have been actuarially unsound and the pilots in the Districts concerned are almost unanimous in their discontent over the benefits they will derive from them.

The Commission’s terms of reference make it necessary to investigate this situation, determine the cause and ascertain whether pilot funds retain their usefulness. One conclusion indicated by the Commission’s studies of the whole pilotage field is that pilot funds were necessary when the rôle of the Pilotage Authority was limited to licensing and the only possible status of the pilots was self-employed contractors in a society lacking state social assistance, but the welfare programmes in existence today have altered circumstances to such an extent that these funds are now outdated. A second conclusion is that the pension funds which developed out of the original pilot funds are neither contemplated by the Act nor consistent with it, thus causing the present unsatisfactory situation.

A pilot fund consists of certain monies placed at the disposal of a Pilotage Authority for the special purpose of providing financial assistance to licensed pilots who are prevented from exercising their calling, either temporarily or permanently, on account of some physical incapacitation, or to dependents of deceased pilots and, of recent years, to pilots whose licence has been cancelled by a Court of Formal Investigation (vide C. 5, p. 98). The ultimate permissible limit of aggregate benefits is the amount of money available in the fund. Although a surplus could accumulate on account of the nature of the sources of the fund, this fund was never designed to be in deficit and, hence, any possible surplus could never be large.

LEGISLATION AFFECTING PILOT FUNDS

The pilot fund is a feature of the earliest Canadian pilotage legislation. All existing provisions on the subject are found almost verbatim in the first post-Confederation pilotage legislation, i.e., the 1873 Pilotage Act whose provisions on the matter were drawn from the 1854 Merchant Shipping Act of the United Kingdom.

QUEBEC AND MONTREAL DISTRICTS

Historical Summary

When the first Canadian pilotage legislation was enacted in 1873, it was necessary to take into account the *ad hoc* pilotage legislation governing the extensive pilotage operations on the St. Lawrence River in what was to be known as the Pilotage Districts of Quebec and Montreal. While the question of a pilot fund was new to the rest of Canada, such a fund had been in operation for the benefit of St. Lawrence River pilots since 1805 when the pilotage organization on the St. Lawrence River was put on the same basis as the Trinity House of London. One of the features of that re-organization, of which special mention is made in the title of the 1805 Act, was the creation of the pilot fund that was known up to 1934 as the "Decayed Pilot Fund". The 1805 Act provided, *inter alia*:

"...and the said Fund is hereby vested in the said Corporation [Trinity House] for that purpose and shall be under the management of the said Corporation, who are hereby authorized and required to grant such relief out of the same, to distressed and decayed Pilots, and the Widows and Children of Pilots, as the said Corporation, or the majority thereof, shall see just and proper, and these monies, which, at the end of each year, shall not be distributed for the said purpose, shall be vested in securities, bearing interest, upon immoveable property, according to the best judgment of the said Corporation, or a majority thereof;...".

In 1812, this common fund was divided into two separate funds, one for the Montreal pilots and the other for the Quebec pilots.

This was the situation when the 1873 Act was passed and an exception was made for the Districts of Quebec and Montreal so that their pilot fund continued to be governed by their own legislation which, in the Quebec District, was the Quebec Trinity House Act as revised in 1849 and later amended. When the Quebec Trinity House was abrogated in 1875 and replaced as Pilotage Authority by the Harbour Commissioners of Quebec, in an unprecedented move, the trusteeship and administration of the Quebec Decayed Pilot Fund was entrusted to the pilots themselves, i.e., to the 1860 Quebec Pilots Corporation. Quebec was the only District where the pilots had been formed into a public corporation for the purpose of operating the pilotage service under the supervision of the Pilotage Authority. As far as

the pilot fund is concerned, this situation has remained unchanged ever since for, although the 1914 Act deprived the 1860 Quebec Pilots Corporation of all its operational powers, this responsibility remained. In 1950, following the report of the Audette Committee which had found that the Quebec Pilot Fund, along with other pilot funds, was in a precarious financial position, an amendment to the Act was made to transfer the trusteeship and administration of the fund to the Quebec Pilotage Authority and, at the same time, to abrogate the remaining provisions of exception in this regard. The amendment provided, however, that the new provisions were not to come into force until proclaimed by the Governor in Council and, up to the present, this proclamation has not yet been made. At the time of the last consolidation of the statutes in 1952, the 1950 provisions, although not in effect, were substituted for the others they were to replace, if and when proclaimed, with the result that subsec. 329(1) and secs. 373 and 374 of the 1952 Canada Shipping Act are not in effect and, on the other hand, subsec. 319(1) and secs. 366 to 370 inclusive of the 1934 Act are still in force (vide C. 1, pp. 8 and 9, and 16 to 18).

Quebec District Pilot Fund

Apart from subsec. 319(1) and sec. 366, both of the 1934 C.S.A., which contain a special proviso of exception, the other provisions of general application regarding pilot funds should apply to the Quebec District fund unless they are inconsistent with the specific provisions governing the Quebec fund and previous legislation which is kept in force by reference. There is no need to make an exhaustive study of the question here. At first glance, it would appear that none apply to the Quebec Pilot Fund because all the aspects dealt with in the provisions of general application of the Act are already covered in secs. 367 to 370, 1934 C.S.A. and in secs. 56 to 63 of the 1849 Quebec Trinity House Act (Ex. 703). However, except for the legal title of the trusteeship, the question of by-laws and the supervision of the operation of the fund, the Quebec Pilot Fund operates in conditions similar to those in the other Districts.

The specific statutory provisions applicable to the Quebec Pilot Fund are as follows:

- (i) sec. 367, 1934 C.S.A., makes it the responsibility of the Quebec Pilotage Authority to fix the pilots' contribution and authorizes it to make the necessary deductions from the pilots' earnings and to pay these deductions over to the Treasurer of the Quebec Pilots Corporation;
- (ii) sec. 368, 1934 C.S.A., quotes the statutory authority of the Quebec Pilots Corporation "which shall have the same rights and powers as Trinity House of Quebec possessed" in relation to the fund and requires that the administration be in conformity with the Quebec Trinity House Act of 1849 and its amendments;

- (iii) sec. 369, 1934 C.S.A., limits the investment powers of the corporation to those enjoyed by trustees in general, thereby making applicable for this purpose the pertinent provisions of the Quebec Civil Code;
- (iv) sec. 370, 1934 C.S.A., requires the corporation to account for its administration of the pilot fund to the Minister as such and not as Pilotage Authority.

The reference to pre-Confederation Acts that are otherwise abrogated is a source of difficulty, e.g., the procedural requirements regarding the adoption of regulations as contained either in the Trinity House Act or in the 1860 Quebec Pilots Corporation Act can no longer apply. This creates a serious problem as to the validity of the Corporation's by-law which regulates the Quebec fund. (The Quebec District pilot fund is dealt with in more detail in Part IV of the Commission's Report [Quebec District, *Pilot Fund*].)

Montreal District Pilot Fund

In the Montreal District, the last exception affecting the pilot fund disappeared in 1934 with the abrogation of sec. 484, 1927 C.S.A., thus placing the fund completely under the provisions of general application of the Act. In practice, this modification in legislation made little difference to the Montreal pilots because they never had control of their pilot fund.

OTHER DISTRICTS

The provisions of general application which govern the pilot funds of all other Districts, including Montreal, are the following: subsec. 2(68) C.S.A., subsec. 319(1) (1934) C.S.A., sec. 329(m) C.S.A., subsec. 351(2) C.S.A., sec. 358 C.S.A., sec. 366 (1934) C.S.A., sec. 375 C.S.A., and sec. 708 C.S.A. These statutory provisions must be studied carefully to reveal the true nature of the institution which early pilotage legislation envisaged as the "pilot fund".

Provisions of General Application

Subsec. 2(68), C.S.A., the first of these general provisions, is the statutory definition. It reads:

" 'Pilots' fund' means any fund hereafter established by a pilotage authority for the relief of retired or superannuated or infirm licensed pilots or their wives, widows or children;"

The spelling of *pilots' fund* is considered to be a drafting error; this is the only place in the Act where the term is spelled in this way (vide C. 4, p. 98). This definition is still almost verbatim the definition contained in sec. 2, 1873 Pilotage Act and the only modification occurred in 1934 when the present text was adopted. The only change that could be considered of

substance was the addition to the list of beneficiaries of “retired” licensed pilots, thus indicating that not only incapacitated pilots can benefit from such funds but also those who are retired although physically fit. This addition coincided with the addition of the provision which is now subsec. 373(c) C.S.A.

Subsec. 319(l), 1934 C.S.A., provides that a pilot fund is created by a by-law made by a Pilotage Authority (vide C. 8, pp. 314 and 315). It also gives authority for pilot funds to be created jointly by a number of Pilotage Authorities through a joint by-law. Although this provision has always been in the Act, it appears it has never been implemented. The text was copied from the legislation governing the Trinity House of London where the operation of joint pilot funds is facilitated because it is the Pilotage Authority of a large number of Pilotage Districts (vide App. XIII, *United Kingdom*). In Canada, the only experience with a joint fund occurred in the early days of the Quebec Trinity House when its jurisdiction extended to the pilots of both the Quebec and Montreal Districts. The Quebec pilots soon complained against the extensive demands made on the fund by their colleagues of the Montreal group and their objections led to the division of the fund in 1812. This step foreshadowed the division of the District (vide Part IV, Quebec District, *History of Legislation*).

The word *funds* is used in the plural indicating that more than one fund can be created in a District, probably for different classes of beneficiaries or for different purposes but, in fact, since Confederation, no more than one pilot fund per District has ever been created. Conversely, this subsection gives the Pilotage Authority power to determine by by-law the contributors to each of these funds and foresees that the amount of their contribution will be fixed.

It is interesting to note that the funds that could be created under this section are not identified in the text by the use of the term “pilots’ fund” (or “pilot fund”) as might be expected in view of the statutory definition. Instead, the subsection re-defines these funds by repeating the text of the statutory definition except for the reference to “retired” licensed pilots which is omitted. A strict interpretation would see in this a deliberate act on the part of Parliament which would mean that a pilot fund for pilots that are retired other than for superannuation could not be created under this subsection. However, such an interpretation would render the provision of subsec. 373(c) inapplicable as there is no other means provided for the creation of a pilot fund. Here again, it must be considered that this was merely the result of another of the numerous drafting errors which occurred in the 1934 Act because the necessary correlation was neglected.

This subsection also authorizes the Pilotage Authority to make the necessary regulations regarding the administration of such funds (the provisions of sec. 328 C.S.A. do not apply to the pilot fund—vide C. 8, p. 317),

to determine the contributors and the amount of their compulsory contribution. (Re power to sue and be sued—vide C. 8, p. 321 and ff.) Prior to 1934 (vide subsec. 415(1), 1927 C.S.A.), fixing the contribution was an absolute power of the Pilotage Authority to be exercised through by-laws. While the Act was silent as to the criteria for fixing the contribution, it is apparent from this context that it was to be a percentage of the pilots' earnings sufficient to produce enough revenue for the fund to meet current and expected liabilities still unpaid after the money accruing from other sources of revenues was spent. Since the 1934 amendment, the rôle of the Pilotage Authority as regulation-maker has been reduced to an obligation to reproduce in the By-law the decision arrived at on this question, either through an agreement between the pilots and the Pilotage Authority or, failing this, by the Minister acting as arbitrator (vide C. 8, p. 299). The only permissible contribution that may be levied is against the pilots' earnings and not against the pilotage dues (vide C. 5, p. 109). [For comment on the grammatical error in the last phrase, vide C. 8, p. 298.] Except for the 1934 amendment regarding fixing the contribution, the contents of this subsection correspond to the first part of subsec. 18(12), 1873 Pilotage Act.

Subsec. 329(m) C.S.A. authorizes the Pilotage Authority of any District to determine through by-laws the beneficiaries of the fund and to fix "the terms and conditions upon which they are so entitled" [to participate]. This provision is a verbatim reproduction of subsec. 433(m), 1906 C.S.A. Formerly (vide subsec. 18(12), 1873 Pilotage Act), the provisions of this subsection formed only one subsection with those of subsec. (l). In order to be understood, this provision must be read in its context, especially with secs. 358 and 375 C.S.A.

Subsec 351(2) C.S.A. is a verbatim reproduction of subsec. 60(3)(c), 1873 C.S.A. It refers to a situation that is almost no longer found. It creates two additional sources of revenue for the pilot fund: first, pilotage dues collected in Districts where the payment of dues is compulsory from ships which are required to take a pilot on their inward voyage but failed to do so; these dues are to be attributed to the pilot fund if the Pilotage Authority is unable to find any pilots with a valid title to them (vide C. 5, p. 99); second, the quasi-fine that may be imposed under subsec. 350(1) on non-exempt ships which have failed to comply with the requirement of sec. 349 (vide C. 5, p. 99 and C. 6, p. 201).

Sec. 358 C.S.A. creates a statutory right for certain persons to be beneficiaries of a pilot fund. It stipulates that a pilot who was "compelled to retire . . . on account of age or mental or bodily infirmity, and every widow and child of a deceased pilot is entitled. . ." to benefit from the fund, but the extent of the benefits is left to be determined by the Pilotage Authority. This section is almost a verbatim reproduction of sec. 39, 1873 Pilotage Act. As a result of this section, the potential beneficiaries of a pilot fund as defined in the statutory definition and the first part of subsec. 319(1), 1934

C.S.A., are divided into two categories: those who are beneficiaries by statutory right whenever a pilot fund exists, i.e., those enumerated in sec. 358 C.S.A.; and those who may become beneficiaries if so designated by a by-law made under subsec. 329(m), always provided they fall within the terms of reference of the fund as above stated. The only categories of authorized beneficiaries not covered in sec. 358 are pilots only temporarily incapacitated and pilots compelled to retire because their licence was withdrawn by a Court of Formal Investigation. The omission of a reference to the latter group in sec. 358 (unless it might be attributed to an error of drafting in 1934) would mean that the Pilotage Authority through an administrative decision (because it does not come within its regulation-making power as defined in subsec. 329(m)) could decide under subsec. 375(c) not only the extent of the benefits to which they would be entitled but also whether any benefits at all would be granted. This, however, does not appear to be the intent. As for the former group, it might be debatable whether temporarily incapacitated pilots, if they were made beneficiaries by a regulation made under subsec. 329 (m), could derive a benefit from a pilot fund. However, it is considered that this is the case, as will be demonstrated later.

Sec. 366, 1934 C.S.A., provides for the administration of pilot funds of the superannuation, retirement and annuity type. It authorizes the Minister of Transport and the Minister of Finance to become joint administrators, states that funds deposited with the Receiver General are to draw interest at a rate fixed by the Department of Finance and regulates the investments that may be made by the Pilotage Authority when investments become necessary by providing that they are limited to "Dominion bonds or other Government securities approved by the Governor in Council, in the name of the Minister of Finance in trust for such funds". This procedure is compulsory for Districts where the Minister is the Pilotage Authority and is optional for the others.

This raises two questions: first, how are pilot funds not of the three types mentioned to be administered observing that Parliament, by using other language to define the type of funds to which sec. 366, 1934 C.S.A., applies clearly restricted the application of the provisions of this section to these funds; second, would the Pilotage Authorities who have not elected to have their pilot fund administered pursuant to the provisions of sec. 366, 1934 C.S.A., be entitled to invest any monies not immediately required and, if so, is there any restriction on their power of investment? As for the first question, the Act contains all the necessary provisions, i.e., funds will be administered as provided in the regulations made under subsec. 319(1), 1934 C.S.A. There appears to be no objection if the actual administration is entrusted to any third party but, in all cases, the Pilotage Authorities would remain the legal trustees and, therefore, would remain accountable and personally responsible. The second question raises difficulties. On one hand, it indicates that in Districts where the Minister is not the Pilotage Authority

there may be pilot funds in the form of superannuation, retirement and annuity funds and, hence, there will be sums of money which should be invested. Good administration also requires that any unspent surplus and any other money that is unlikely to be spent for a substantial period should be invested, bearing in mind that the contributions from the pilots can not be reduced below the 5% statutory minimum (vide C. 8, p. 321). The absence of provisions limiting their power of investment would indicate that the Pilotage Authorities would have the power to invest these funds as they see fit but, in all cases, they would be personally responsible if a loss occurred through risky investments. This very unsatisfactory situation, both for the trustees and other interested parties, is the result of the 1934 amendment which unduly limited the application of the former general provision it replaced. Before its abrogation by the 1934 Act, this provision was sec. 490, 1927 C.S.A., which corresponded almost verbatim to sec. 84, 1873 Pilotage Act. Sec. 490 came immediately after what is now sec. 375 C.S.A., i.e., the section which defines the only permissible expenditures from the pilot fund. It was in logical sequence because it authorized the investment of any surplus that might remain after all the fund liabilities were met, and it applied to any type of fund. Sec. 490, 1927 C.S.A. reads:

“490. Every sum of money belonging to any pilot fund which has not been employed in such payments as aforesaid, including sums of money forming part of pilots’ funds now existing, of which reinvestment becomes necessary, shall be invested in Dominion stock or other Government securities, approved by the Governor-in-Council, in the name of the pilotage authority having control of the fund to which the sum of money belongs”.

The provisions of sec. 490, 1927 C.S.A., can still be found in the last part of sec. 366, 1934 C.S.A., but it is now qualified by the first part which, on one hand, restricts its application and leaves the cases to which sec. 366, 1934 C.S.A., does not apply uncovered. Furthermore, the provisions of sec. 366, 1934 C.S.A., can not apply to investments made by Pilotage Authorities in their own name, such as is done, for instance, in Miramichi, or as done—until a few years ago—in New Westminster, because then such investments were not made “in the name of the Minister of Finance in trust for such funds”. Furthermore, by reversing the sequence of the sections, the direct dependence of the question of investments on having a surplus in the fund after liabilities have been paid has been lost, thereby creating a further cause of confusion.

It is considered that the 1934 amendment was the result of failure on the part of those who drafted it to grasp the real meaning of a pilot fund as an institution. By identifying it with an investment fund (into which it had, in fact, developed), they encouraged a concept which is in conflict with the rest of the statutory provisions governing pilot funds.

Sec. 375 C.S.A. defines the only permissible ways the Pilotage Authority as trustee of the pilot fund may dispose of trust monies. Any other disbursement, therefore, becomes a misuse of public funds (vide C. 5), for the reimbursement of which the members of the Pilotage Authority are personally accountable in addition to the penal sanction to which such action renders them liable. The fact that by-laws exist purporting to authorize additional expenditures does not alter the situation because nowhere is any power given to anyone to make regulations modifying or enlarging the complete and limitative provisions of sec. 375. The only permissible expenditures from the fund are:

- (A) administrative expenses of the fund, including the cost of legal proceedings in which the Pilotage Authority may become involved in its function of trustee (vide C. 8, pp. 322 to 325);
- (B) benefits to incapacitated pilots during the period of their incapacitation and to dependents of deceased pilots;
- (C) benefits to pilots whose licence was cancelled by a Court of Formal Investigation following a marine casualty.

Pilot fund monies can not be spent for any other reason. *Inter alia*, no payment is authorized, not even partial reimbursement of contributions, to pilots who retire voluntarily, or are compelled to retire for any other reason than in (B) and (C) above, e.g., either because their licence is forfeited for non-usage pursuant to sec. 336 or is cancelled by the Pilotage Authority for unreliability (vide C. 9, pp. 370 and ff.).

Subsecs. (a) and (b) of sec. 375 are a verbatim reproduction of sec. 83, 1873 Pilotage Act; subsec. 375 (c), is new legislation which was added in 1934 (subsec. 371(c), 1934 C.S.A.). Prior to that amendment, a pilot whose licence was cancelled by a Court of Formal Investigation could derive no benefit from the fund, even though cancellation placed him in financial straits. It was felt that since he had brought about his own misfortune, he was not entitled to the assistance of his confreres. It is considered that this 1934 amendment also arose from a misconception of the nature of the pilot fund because it was erroneously treated as a pension fund conferring acquired rights on the contributors although this is not the case with a pilot fund.

Sec. 708 C.S.A. creates a fifth source of income for the fund, i.e., any fine that a pilot or apprentice pilot is awarded for an offence against the provisions of Part VI or for a breach of pilotage regulations. This provision corresponds in substance to secs. 18 and 89, 1873 C.S.A. Due presumably to an error in drafting when the 1934 Act was prepared, when the distinction was made between a fine and a penalty, the former provision corresponding to sec. 708 was limited to fines and no disposition was made of the other penal sanctions that could be imposed, i.e., penalties. There appears to

be no valid reason for not having credited both fines and penalties to the pilot fund. In practice, there has been no problem because no use was made of the power of imposing penalties through regulations (vide C. 6, p. 201).

SPECIAL PROBLEMS

Nature of pilot funds

As indicated above, most of the amendments made in 1934 to the statutory provisions governing pilot funds were made under the erroneous concept that a pilot fund was synonymous with a pension fund, i.e., a fund whose contributors acquired rights to stated benefits. The wording of the unamended provisions and of the provisions prior to the amendments clearly indicates that a pilot fund was intended to operate so that liabilities were paid as they arose out of the fund itself and the investment of capital was not the governing factor but only a possible eventuality that would arise if a surplus remained after all current obligations were met. Such a fund was never supposed to be in deficit because any liabilities that remained after all the monies received from other sources had been expended were to be covered by an appropriate contribution from the pilots' earnings. In other words, this fund was to operate in much the same way as a District operational expense fund. This is far from the modern concept of a pension fund where each contributor acquires rights, so much so that, if he ceases prematurely to become eligible to benefits, he is normally entitled to withdraw his contributions. Such rights do not exist in a pilot fund: the only purpose served by the pilots' contributions is to pay current liabilities.

Like the operating expenses of the District, pilot fund benefits are, in fact, met by shipping through pilotage dues. The fact that they are collected from the pilots' earnings is only a method of indirect assessment because, when the Pilotage Authority fixes the dues, it takes into consideration what net earnings will remain for the pilots after all deductions from pilotage dues, i.e., their gross earnings.

Determination of benefits

While the existence of a pilot fund entitles the beneficiaries listed in the Act and in the regulations to some kind of benefit when in financial need, they do not acquire any right to a definite or predetermined amount. No specific sum is defined in the Act for any class of beneficiary and the Pilotage Authority is powerless to bind itself in advance by defining any benefits through regulations. The determination of benefits is not a matter of legislation but a matter to be decided administratively, bearing in mind the circumstances of each case, i.e., the degree of financial need, the extent of the fund's other liabilities and the amount available in the fund. Subsec. 329 (m) C.S.A., which deals with the naming of beneficiaries, allows the Pilotage Authority to establish the terms and conditions for those beneficiaries to

become entitled to participate in one of the many funds that may exist in the District but does not permit fixing the actual amount of such benefits. This is consistent with the nature of the fund which mainly depends upon current earnings for its operations and, therefore, precludes drafting legislation which will cause liabilities to be incurred automatically irrespective of the solvency of the fund. This is further substantiated by the text of secs. 358 and 375 (c) which make it a prerogative of the Pilotage Authority to fix benefits and place no conditions on the exercise of this power in contrast to the proviso which is always included when the power is to be exercised through regulations (vide, *inter alia*, secs. 327, 329 and 330).

Temporarily incapacitated pilot as a beneficiary

Another question of interpretation is whether the fund, as defined in the various texts of the Act, applies only to ex-pilots and to dependents of deceased pilots or whether it might also apply to active pilots who are financially distressed because their activities are suspended due to illness or temporary injury.

First, it must be remembered that the system was devised for free contractors whose only income was the pilotage dues earned by their activities and that interruption of their activities meant they received no revenue during any period of incapacitation. If subsec. 2(68) C.S.A., subsec. 319(l), 1934 C.S.A., sec. 490, 1927 C.S.A., secs. 358 and 375 are read together, this intention is clearly indicated.

Since the beneficiaries in sec. 358 are designated by different terms than those uniformly used in other sections, it is clearly indicated that a distinction is being made.

Sec. 358 clearly refers to retired pilots and dependents of deceased pilots who participate in a pilot fund by statute if they meet the conditions stated in that section. The statutory definition (subsec. 2(68)) distinguishes between retired, superannuated and infirm licensed pilots (the category "retired" was not added until 1934, probably to cover the new beneficiaries not previously covered, i.e., pilots whose licence was cancelled by a Court of Formal Investigation but who were neither superannuated nor infirm). "Superannuated" refers to a person who was compelled to retire because of age limit or incompatible disability. "Infirm" pilots are mentioned without further qualification (contrary to what is done in subsec. 329(j)). The word "infirm" used alone refers only to a person who at a given moment is not in good health either temporary or permanent. It is important to remember that the language used in these sections dates back over 150 years because these provisions are found almost verbatim in various sections of United Kingdom pilotage legislation predating our Confederation. In fact, in the U.K., these words have given rise to the same controversy and some Pilotage Authorities have interpreted them to authorize them to grant relief in cases of temporary

incapacity (vide Report of the Departmental Committee on Pilotage [United Kingdom] 1911, sec. 210). The same procedure was followed here in Canada in the early days of the Quebec Trinity House as is proved by the complaints filed by pilots against the obligation imposed upon them to pay back financial relief received during periods of temporary incapacitation. In the complaint the pilots forwarded to the Government in 1831 they urged, *inter alia*, that "all Pilots in case of sickness should receive a proportionate allowance from the same Fund, without being obliged to reimburse the same on the recovery of their health" (vide Part IV, Quebec District, *History of Legislation*).

SUMMARY OF GENERAL PROVISIONS

It follows from the foregoing general statutory provisions that:

- (i) a pilot fund is merely an assistance fund of a benevolent character for pilots and their dependents in financial need; it is not a compulsory saving plan nor a plan in which contributors ever acquire rights to predetermined benefits;
- (ii) to exist, a pilot fund must be created by District Regulations (except the Quebec Pilot Fund which was created by statute, i.e., the Quebec Trinity House Act); where none is created, the sources of revenue attributed to the Pilot Fund by statute must be paid to the Consolidated Revenue of Canada unless an alternative is provided (vide C. 5);
- (iii) there are five sources of revenue for a pilot fund:
 - (A) compulsory payment of pilotage dues when the conditions of sec. 351 C.S.A. are met;
 - (B) quasi-fines imposed pursuant to sec. 350(1);
 - (C) fines paid by pilots and apprentice pilots (sec. 708);
 - (D) interest derived from the investment of any surplus after liabilities have been met (sec. 366, 1934 C.S.A.);
 - (E) not less than five per cent of pilots' earnings levied by regulation to meet expected expenses and liabilities (subsec. 319(k), 1934 C.S.A.);
- (iv) there are two types of beneficiary:
 - (A) statutory beneficiaries who are:
 - (1) retired pilots whose retirement was caused by age or mental or bodily infirmity (sec. 358);
 - (2) widows or children of deceased pilots (sec. 358);
 - (3) pilots whose retirement resulted from the withdrawal of their licence by a Court of Formal Investigation following a marine casualty (subsec. 375(c));

- (B) regulation beneficiaries, i.e., pilots temporarily incapacitated through illness or injury, if this contingency is covered in a regulation (subsec. 2(68) C.S.A.; subsec. 319(l), 1934 C.S.A.; subsec. 329(m) C.S.A.; subsec. 375(b) C.S.A.);
- (v) determination of benefits is left to the administrative discretion of the Pilotage Authority (subsec. 329(m), sec. 358 and sec. 375 C.S.A.); they can not be fixed in advance by regulation, but must be the result each time of an *ad hoc* administrative decision.

To complete the picture, it is worth mentioning that prior to 1934 there was an additional source of revenue for the pilot fund, i.e., the fees payable by Masters and mates for granting or renewing pilotage certificates. In the 1927 C.S.A., this was covered by sec. 471 which, with all the other provisions relating to pilotage certificates, was abrogated when pilotage certificates were put under the regulation-making power of Pilotage Authorities. However, the definition of the regulation subject matters contained in subsecs. 329(d), (e) and (f) C.S.A. failed to authorize Pilotage Authorities to legislate on the application of the fees they could impose. Of all the sources of income of the Pilot Fund, the pilots' contribution is the most important. The three first sources listed are always minimal. Interest will never be significant because large surpluses are not normally accumulated if the fund is managed on a strict basis of earnings and expenditures to ensure that a contribution is levied only when there is not enough money in the fund to meet current liabilities.

FACTUAL SITUATION

EXISTING PILOT OR PENSION FUNDS

The factual situation is totally different to that provided for by legislation. The term "pension fund" is used in District By-laws instead of *pilot fund*, thus clearly indicating the type of benefit scheme into which pilot funds have developed. As of 1963, only eight Districts (not counting St. John's, Newfoundland) had some kind of pension arrangement and there was none in the smaller Districts, except Miramichi. In addition, in all the Districts where the pooling system exists, the pilots enjoy many financial benefits, e.g., holidays with pay, sick leave with pay, medical and hospital coverage, incapacitation protection, all paid directly or indirectly out of the pool.

As of 1963, the situation in those Districts which possess some sort of pilot fund or pension fund was as follows:

- (a) Six Districts where the Minister is the Pilotage Authority had a pension fund, i.e., British Columbia, Halifax, Montreal, Quebec, Saint John (N.B.) and Sydney.

- (b) Three Districts where a local commission is the Pilotage Authority had coverage based on the statutory provisions:
 - (i) Miramichi, a type of compulsory saving, i.e., a “money-purchase” plan, the annual contribution being used to purchase government annuities for the contributors;
 - (ii) St. John’s, Newfoundland, a form of compulsory saving whereby contributions were accumulated by the Pilotage Authority as trustee to be handed over with interest to the pilot when he left the service;
 - (iii) New Westminster, a private group “money-purchase” plan administered by an insurance company to replace the District pension trust fund which the pilots voted to abolish.
- (c) The four Districts of Bras d’Or, Churchill, Cornwall and Kingston where the Minister is Pilotage Authority had neither pilot nor pension fund.
- (d) The thirteen other Districts where a local commission is Pilotage Authority, i.e., Bathurst, Botwood, Buctouche, Caraquet, Humber Arm, Pictou, Port aux Basques, Prince Edward Island, Pugwash, Restigouche River, Richibucto, Shediac and Sheet Harbour, had neither pilot nor pension fund.

In view of the importance of the question, the Commission employed The Wyatt Co., a firm of actuarial consultants, to study existing pilot or pension funds, analyse their benefits and appraise their actuarial situation. In their study, the firm reviewed all relevant testimony received during the various hearings of the Commission and also all available documentation on the subject, *inter alia*, the Audette Committee Report, and a number of actuarial studies made by the Department of Insurance on various occasions. Their report dated May 18, 1965, is contained in Appendix XII to this Part of the Commission’s Report. In addition, each case is studied in detail in the other Parts of the Report dealing with the Districts concerned.

AUDETTE COMMITTEE REPORT

However, in order to appreciate how such a confused situation actually developed, as well as the attitude taken by Pilotage Authorities and the Government, it is relevant to refer to the Audette Committee Report of 1949 and to trace the sequence of events since then.

The Audette Committee was appointed August 10, 1949, by Order in Council P.C. 3978 “to consider and report upon pilotage and related matters” in the main Districts where the Minister was the Pilotage Authority, i.e., Halifax, Sydney, Saint John, Quebec, Montreal, St. Lawrence-Kingston-

Ottawa, and British Columbia. Their investigation showed that the question of the various pension funds that existed in most of these Districts was particularly disturbing. It is noteworthy that, although they detected the cause of the difficulty, they did not recommend a remedy. On pages 10 and 11 of their Report, they state:

“Our witness went to great pains to show us that the difficulties had arisen as a result of confusing what was originally a Decayed Pilots’ Fund with an ordinary pension fund containing certain insurance features. We do not think it essential to analyse this difference for the purpose of our report.”

They continued trying to ascertain what organizational changes could be made to improve existing pension schemes, apparently taking it for granted that such institutions were required but without investigating whether such funds were permissible under existing legislation. On page 10, they bring out the two main reasons why the pension funds had deteriorated:

“Our examination of the pension fund vicissitudes has led us to the belief that the difficulties in the various districts and the instability or insecurity of the various funds are due to the fact that the contributions by the pilots and the benefits paid out do not bear a sound actuarial relation one to the other. A further contributory cause has been the fact that the number involved in the various pension groups is too small for stability.”

They found that the six pension funds existing in Districts where the Minister was Pilotage Authority were deeply in deficit and that the situation was bound to get worse because the pilots were not satisfied with the pension benefits derived from their contributions and were requesting a substantial increase. The Committee pointed out that if this was done the increase should also be extended to the actual pensioners in view of the decreased purchasing power of the dollar. As for the deficit, they say on page 11:

“The total deficit of the amalgamated pension funds on their present basis is represented to us as now being approximately \$1,500,000. We are further informed that, on the basis of benefits equivalent to \$100.00 for each year of service, which is approximately what the pilots now seek, this deficit would be in excess of \$3,000,000.00.”

In order to correct the situation, the Committee pointed out that it would be an unbearable burden for the pilots if they were requested to make good the deficit and instead, in view of the share of the blame that the Pilotage Authority (i.e., the Minister) had to accept as the authority responsible for these pilot funds, it recommended that the deficit of \$1,500,000 be made good by the Crown, that the six funds be amalgamated and that such amalgamated pension funds be strictly administered in order to keep them actuarially sound. Here are pertinent excerpts:

“. . . we feel that the situation has now reached a point where the making good of the deficit by the pilots themselves would represent a crushing burden.

Our recommendation is that the Government should make good this deficit of approximately \$1,500,000.00 and that the pension funds of the various districts should be amalgamated in one fund completely under the control and in the

custody of the Pilotage Authority. We realize that some of this payment by the Government represents a compensation for its share of responsibility in the disaster which has befallen the Pilots' Pension Funds and that some of it is *ex gratia*."

"... We feel that there would be a distinct advantage to all concerned in such an amalgamation as it would give a measure of stability which has been lacking."

In making this recommendation, the Committee failed to appreciate the situation as a whole. There was no possibility of centralizing a pension fund in the hands of "the Pilotage Authority" because under Part VI pilotage is essentially decentralized and there are as many Pilotage Authorities as there are Pilotage Districts. When the Committee refers to the Pilotage Authority, it is concerned only with the Districts where the Minister, as Pilotage Authority, had, in fact, become a central authority. The Committee did not take into account the other pension funds that existed or could be created in Districts where the Minister was not the Pilotage Authority.

On page 14, the Committee pointed out the cause of the inherent difficulty, if not incompatibility, of a true pension fund for pilots. This explains the basic changes that were made later on in the nature of the pension funds:

"It appears to us that contributions made by the pilots towards their pension funds cannot be made on the basis of a direct percentage of their earnings. These earnings fluctuate and vary over long periods and, in many cases, are seasonal. If the contribution to the pension fund is based upon a factor which is essentially variable, it may well be that the fund will again be faced with a serious deficit if the volume of business drops off or perhaps with a surplus if times are good. We do not think that any pension system should be set up on a basis involving a gamble with economic conditions and we recommend that the contributions to the pension fund should bear a direct actuarially sound relation to the benefits which the pilots seek to withdraw in their old age. In making this recommendation, we are fully aware of the fact that the burden of payment will be proportionately lighter in the better years and proportionately heavier in the leaner years. This is an inevitable result of economic principles . . .".

GOVERNMENT ACTION

The Audette Committee recommendation was not implemented; the Crown did not make good the deficit and the Pilot Funds were not amalgamated, even in those Districts where the Minister was Pilotage Authority. However, their report impelled the Government to take notice of the situation and the following action was taken:

- (a) In order to make possible direct control over the Quebec Pension Fund, a 1950 amendment to the Act abrogated all special statutory provisions for the Quebec Pilot Fund. The effect of this amendment was to place the Pilotage Authority, i.e., the Minister, in full charge of the Quebec Pilot Fund as in the other Districts where he was Pilotage Authority and, at the same time, to deprive the Quebec Pilots Corporation of all the controls and powers they had

enjoyed over that fund since 1874. As stated earlier, this amendment was not to come into force until proclaimed; so far this has not been done and the Quebec Pilot Fund remains under the control and administration of the Quebec Pilots Corporation.

- (b) The active pilots were required to make good the errors of their predecessors and of their Pilotage Authorities.
- (c) Regulations were made to ensure actuarial relationship between contributions and guaranteed benefits.

In order to achieve these last aims, the Government exercised closer supervision over the pension funds and many actuarial appraisals were made by the Department of Finance as a result of which various adjustments were made both in contributions and benefits. Although the aggregate deficit of the six funds reported on is still very high, the situation in general has gradually improved. The most drastic remedial measure was taken in the Halifax Pension Fund: its benefits ceased for service after March 31, 1956, but the pilots were required to continue to contribute five per cent of their earnings to make up the deficit without deriving any eventual benefit. While this action was sound in practice, nevertheless it was illegal under the existing statutory provisions governing pilot funds. Once a pilot fund exists, the persons mentioned in sec. 358 C.S.A. have statutory rights to benefit from it and, although the amount of the benefit is left to the discretion of the Pilotage Authority, it must be reasonable and equitable, otherwise it becomes in effect a denial of those statutory rights.

As pointed out in the Audette Committee Report, it was actuarially unsound to provide through legislation for fixed benefits in return for variable contributions. For this reason, each pension plan over which the Government had control was eventually changed to a "money-purchase" plan combined with a deficit liquidation plan. The deficit was terminated on a certain date by altering future pension benefits to pension units determined by total contributions. Under this system there will never be a deficit but the pilots can not calculate in advance what amount they will eventually receive. On the other hand, since liabilities incurred up to that time had to be made good, part of the contributions made by the pilots were diverted in accordance with the liquidation plan to meet the deficit that had accrued up to then.

In 1962, the Royal Commission on Government Organization touched on the question of the pilots' pension plans and in volume 3 of the Report, pages 294 and 295, made the following comments and recommendations:

"Only one fund is in a solvent position. Deficits in the others, which have been calculated to exceed \$1.2 million, have arisen through a steady improvement in benefits without corresponding increases in contributions. These plans cover no

more than 360 pilots, and the deficiency on a per capita basis is extremely large. The Halifax plan has already ceased to operate, and others will encounter the same fate unless action be taken to place their financing on a sound basis.

Nevertheless, your Commissioners realize that a solution to this question is only part of the larger problem of clarifying the entire future status of pilots and the government's responsibilities to them.

We therefore recommend that: Either the pilots' pension plans be placed on a sound financial basis, or the government clarify its position by repealing those sections of the Canada Shipping Act that imply some responsibility."

ARRANGEMENTS MADE BY PILOTS

The latest trend has been for pilots as a group to contract out their pension scheme to insurance companies and corporate trust companies. The first pilots to adopt that method were the New Westminster pilots who, as a group, entered into a contract with an insurance company and obtained a group annuity. The plan was instituted October 1, 1958, to replace a pension fund previously administered by the New Westminster Pilotage Authority. The assets of the trust fund were transferred to the insurance company and allocated to the then members and retired members on the basis of years of service. Despite the fact that the terms of the pension contract with the insurance company are not detailed in the District By-law and that the Pilotage Authority neither created the new pension scheme by by-law nor exercises control over it, use is still made of the provisions of subsec. 319(1), 1934 C.S.A., to levy compulsory contributions for the support of a private fund. This situation is considered to be irregular. Since there is no pilot fund created under a New Westminster District By-law, no use can be made for other purposes, even with the pilots' unanimous consent, of the powers given by subsec. 319(1), to impose a privately arranged pension scheme by regulation. The pilots, as individuals, are at liberty to subscribe to any private scheme but their participation and their contributions can not be made compulsory under the Canada Shipping Act.

ACTUARIAL APPRAISAL

The actuarial appraisal of the pension funds of six Districts where the Minister is the Pilotage Authority that was conducted by the Commission's consultants (vide Appendix XII, Schedule 3), showed much improvement as of December 31, 1963. Although this may be partly attributed to better management of the various funds, another factor is the better yield obtained from investments which made it permissible for the actuarial evaluation to be made on an assumption of higher interest, i.e., 4 per cent instead of 3½ per cent which was the basis of the previous appraisals. It showed an actuarial surplus for British Columbia, Montreal, Sydney and Saint John, while Halifax and Quebec were still in deficit for \$44,525 and \$553,148 respectively.

RECENT DEVELOPMENTS

In order to bring the factual situation up to date, it is necessary to indicate some material changes that have occurred since the 1963 data on which the consultants' report was prepared:

- (a) Effective September 23, 1963, the British Columbia pilots, following the example set by the New Westminster pilots, withdrew their pension trust fund from the trusteeship of the Minister of Transport and the Minister of Finance and handed it over to a trust company as the first instalment on the purchase price of pension benefits in a "money-purchase" plan that they agreed to as a group with the trust company. The book value of the assets of the fund as of December 31, 1963, not including accrued interest, amounted to \$1,307,277, and according to the latest actuarial evaluation showed an actuarial surplus of \$80,259. The contribution to the plan is still levied through regulations passed under sub-sec. 319(I), 1934 C.S.A. The necessary alterations to the sections of the District By-law dealing with the pension fund were effected September 22, 1966, by P.C. 1966-1812.
- (b) When the Sydney pilots became Crown employees in 1966, they were automatically entitled to all the welfare benefits enjoyed by public servants including those provided by the Public Service Superannuation Act. In consideration of the transfer to the Crown of their accrued trust fund (book value as of December 31, 1963, not including accrued interest, \$431,421), the Sydney pilots were credited for the purpose of superannuation in proportion to the value of their respective personal accumulated contributions and the fund liabilities to those already on pension were assumed by the Crown. This change is dealt with in regulations entitled "Sydney Pilots Pension Regulations" made under the authority of the Appropriation Act, No. 9, 1966, on January 19, 1967. At the same time, the Sydney Pilotage Authority, by By-law dated December 9, 1966 (P.C. 1966-2313), revoked Part II of its By-law, which dealt with the pension fund, and the other provisions, which fixed the compulsory contribution, thereby abrogating the pension fund it had created pursuant to the pilot fund provisions of the Act.
- (c) The Montreal pilots have requested their Pilotage Authority to allow them to follow the example of the New Westminster and British Columbia pilots, but as of early 1968 this had not been authorized.

COMMENTS

Most pension funds still provide for the refund of at least a sizeable part of a pilot's aggregate contributions when he retires voluntarily before he is eligible for a pension, despite the fact that this is contrary to the statutory provisions governing pilot funds.

Whether pilot funds have developed into compulsory savings or insurance coverage, two facts are clear: no type of pension fund is permissible under present legislation and none of the existing plans provides the pilots with the financial protection they most need, i.e., against the ever present risk of premature retirement or temporary suspension following illness or accident. At first sight, it seems strange that the pilots have not reacted and requested effective protection and that the various Pilotage Authorities have not taken steps to provide such protection. The reasons are that the actual situation has changed materially and that most of this protection is now provided indirectly by programmes that did not exist previously.

The social environment in Canada is now totally different to what it was 100 years ago and pilots, like all other citizens, now enjoy a number of social and welfare benefits that obviate the necessity of benevolent programmes such as pilot funds. It is no longer necessary for a pilot to provide for minimum financial assistance for old age because this is already available through the Old Age Pension and, latterly, the Canada Pension Plan benefits that will accrue. In some provinces, the pilots are forced by provincial legislation to contribute to the Workmen's Compensation provincial scheme which, therefore, solves for these pilots the question of financial protection in case of injuries incurred on duty. There also exist a large number of public and private programmes to which individuals and groups may belong on a voluntary basis and which, for a reasonable premium, afford all possible types of protection, e.g., medical and hospitalization benefits, group life insurance, and pension plans. Any pilot who feels he needs special protection not already provided through the common fund can easily obtain appropriate coverage.

As seen earlier, the disappearance of free enterprise has resulted in pooling the earnings of all pilots as a group and pooling has made it feasible (in practice if not in law) to provide financial assistance in case of temporary disability by another means. The pooling rules provide for the continuation of remuneration during illness, which is treated as a normal permissible deduction from the common fund as are contributions to the Provincial Workmen's Compensation scheme where pilots are deemed eligible, as well as premiums for the group protection plans to which the pilots as a group have decided to subscribe. All the benefits derived therefrom are benefits that, pursuant to the present legislation, could only be provided from the pilot fund. Such sick leave remuneration, contributions and premiums could well have been paid out of the money accumulated for that purpose in a pilot fund, but a much simpler procedure is provided with the creation of such a common fund which, to all intents and purposes, if made legal, would render pilot funds obsolete as an institution.

Chapter 11

GENERAL RECOMMENDATIONS

PREAMBLE

This chapter contains the Commission's Recommendations of general application. Recommendations of a local character are contained in the other Parts of the Report which deal with specific Districts. The Recommendations listed and discussed here enunciate the principles on which the recommended new Canadian Pilotage Act should be based in order to meet present requirements and those of the foreseeable future. In addition, certain proposals regarding the most appropriate provisions to implement these basic principles are embodied in various Recommendations. Many other proposals in the form of comments, remarks and conclusions are contained in the ten previous chapters but they have not been listed here to avoid repetition and also because they should be read in their context for best comprehension. A case in point is the determination of pilotage dues which is studied in detail in chapter 6.

The Commission was greatly assisted in its task by the numerous recommendations made by individuals and group representatives who appeared before it, but because their general recommendations were invariably accompanied by recommendations of local character which had to be studied in the local context of the District or the area where they were made in order to be fully understood, these recommendations are not listed here but appear in the other Parts of the Report which deal with the District to which the Briefs refer. When drafting Part 1 of the Report and forming its general Recommendations, the Commission gave careful consideration to all recommendations received and made specific references to them as appeared appropriate.

LIST OF RECOMMENDATIONS

1. Existing pilotage legislation to be repealed and replaced by completely new legislation.
2. The new pilotage legislation to be a separate Act of Parliament.
3. New legislation to be clear, uncomplicated, adaptable and flexible.

4. Control over regulation-making to be improved; proposed regulations to be examined for legality by a competent independent authority before submission for approval.
5. A procedure to be provided to keep pilotage legislation up-to-date.
6. The new Pilotage Act to be fully comprehensive and to contain provisions applicable to all aspects of pilotage.
7. The scope of application of the new legislation to be extended to permit the effective use of pilotage as the ultimate means to achieve safety of navigation and safe, speedy movement of ships when required by the country's superior interest.
8. The Pilotage District to remain the unit of organization.
9. The Act to provide for the problems of contiguous Districts.
10. Non-organized areas to be subject to limited pilotage control.
11. The Act to contain legislative provisions of control for the protection of pilots, shipping and the general public.
12. Licensing to be the essential component of any form of public administrative control over pilotage.
13. The Act to define the basic minimum qualifications required for licensed pilots and approved pilots.
14. The direction and management of the service at local level to be performed by the Pilotage Authority in Districts where pilotage is a public service.
15. The principle of decentralization to be retained and fully implemented.
16. The Central Pilotage Authority to be a Crown agency corporation responsible to Parliament through a designated Minister.
17. The powers of the Central Authority to be enlarged to meet the new aims of proposed pilotage legislation.
18. The function of the Pilotage Authority to be entrusted in each District to a locally self-governing public corporation answerable as such to the Central Authority.
19. Responsibility for making the necessary regulations to be shared between the Central Authority and Pilotage Authorities, according to their respective jurisdiction, and to be exercised under proper control.
20. Pilotage Districts to be self-accounting units under the control of the Central Authority and subject to audit by the Auditor General.

21. A central pilotage equalization trust fund to be created to finance authorized operational deficits incurred by Pilotage Districts.
22. Compulsory pilotage to be imposed when, where and to the extent required in the interest of safety of navigation.
23. Personal exemptions to be an essential feature of any compulsory pilotage scheme and the Act to guarantee the right to such personal exemptions to Masters and mates who are competent to navigate their vessels safely in District waters.
24. Where pilotage is classified as an essential public service, the status of licensed pilots to be that of Crown employees or quasi-employees of the Crown, the former being preferable.
25. All pilots in a District, or each distinct group of pilots within a District, to be a statutory corporate body.
26. Increased statutory surveillance and reappraisal powers to be granted to the District Pilotage Authority.
27. Legislation to establish special methods of keeping Pilotage Authorities informed of the competence, fitness and reliability of pilots.
28. Pilotage Authorities to possess full powers of investigation to conduct administrative enquiries within their reappraisal jurisdiction and responsibility for the safety of navigation.
29. The Act to affirm the right, and make it an obligation, not to despatch when unfitness is suspected, and give the Pilotage Authority the right to impose preventive suspension when reappraisal has been, or is about to be, initiated.
30. The existing distinction between the reappraisal and penal judicial functions to be maintained, together with the allocation of each to different authorities.
31. Pilotage Authorities to be authorized to modify and increase the minimum standard of professional qualifications required of licensed pilots (and other licensees) during the tenure of their licence, and granted reappraisal powers in that field.
32. The Pilotage Authority's reappraisal power over physical and mental disability to be extended to include jurisdiction over temporary disability.
33. Reappraisal of moral fitness to be adjusted to the new pilotage organization but to remain subject to conviction by a regular court for a specified pilotage offence.

34. The Pilotage Authority and the appeal court in the reappraisal process to be untrammelled by rules of evidence and procedural requirements, provided the pilot is afforded an opportunity for full defence; any doubt to be resolved in favour of the safety of navigation.
35. Penal jurisdiction to remain with regular courts; a penalty system to be adopted as a summary procedure for dealing with minor offences.
36. The remedial power of courts created under Part VIII C.S.A. to be directed against pilots' certificates of competency and not their licences.
37. Power to impose suspension *per se* or pecuniary penalty following reappraisal to be denied; reappraisal award to consist only of cancellation of the licence or appropriate remedial action.
38. The Act to grant the District Pilotage Authority and the Central Pilotage Authority emergency powers to provide reasonable temporary pilotage service through alternative plans in case of a strike by pilots where the service is deemed essential in the public interest.
39. Pilot fund legislation to be abrogated; existing pilot or pension funds to cease as a responsibility of Pilotage Authorities and to be disposed of in such a way as to respect and guarantee acquired rights; in Districts where pilots are not Crown employees, welfare and insurance schemes to be imposed by District regulations if required by a substantial majority of the pilots.

RECOMMENDATION NO. 1

Existing pilotage legislation to be repealed and replaced by completely new legislation

The main conclusion derived from a study of the pilotage legislation in the Canada Shipping Act is that it is seriously out-of-date, unnecessarily complicated, obscure and ambiguous and, in some respects, incomprehensible to those who must implement it. The general plan of the Act became inconsistent and unworkable as a result of amendments which were incompatible with its underlying principles and legislation of general application which was approved without making the requisite correlative adjustments.

The Act is obsolete largely because it was drafted to meet the requirements of almost a century ago. Even at that time it was not original legislation but an adaptation of the legislation of the United Kingdom which was couched in language that dated back possibly more than 50 years. In 1873, Canada adopted the U.K. legislation, principles, style and wording. The only change in the general scheme was to avoid the expression "compulsory pilotage" by inventing "compulsory payment of the dues". Despite

this alteration, essentially the same system was, in fact, retained with the result that the Canadian Act was not as clear and simple as the U.K. legislation.

In addition to being unoriginal, the 1873 legislation was unrealistic because its basic scheme envisaged only port pilotage at a time when the most important pilotage operations in Canada involved river pilotage in the two Districts of Quebec and Montreal. This continued to be the situation, particularly after the St. Lawrence Seaway opened in 1959. River pilotage was treated as a case of exception by incorporating in the Act some of the operational provisions of the pre-Confederation legislation which governed these two Districts. Another important deficiency was the absence of any provisions dealing with the special problems of coastal pilotage, although the known extent of Canada's coast-line should have indicated the need for such legislation.

Since 1873, this composite legislation has been materially amended in two fields, both of which made the Act inconsistent and removed it farther from the realities of pilotage in Canada. First, all the provisions of exception which were made to adapt the basic legislation to river pilotage were gradually repealed without being replaced, leaving in operation only the basic scheme of the U.K. Act which is based on port pilotage; second, by introducing a system of exception that soon became the rule, the organization was basically altered by withdrawing the functions of the Pilotage Authority from local, independent, autonomous Boards of Pilotage Commissioners and entrusting these powers and responsibilities to a branch of the Government, the Department of Transport. This was accomplished by what may be termed the subterfuge of appointing the Minister of Transport Pilotage Authority in each of the main Districts, but without amending the basic provisions with which such a centralized and "remote-control" administration is in conflict.

Furthermore, Canadian pilotage legislation is obsolete because it does not provide for the present needs and requirements of pilotage. In Part VI of the Canada Shipping Act, we are still in the age of sailing ships which lacked the speed and manoeuvrability of modern steamships or motorships and which had to rely on visual or audible signals to communicate with shore stations or with other vessels. According to the Act the pilots are still obliged to be on the look-out at the boarding station for ships on their "inward voyages". Moreover, the method of indicating that a pilot is required is to display the correct signal, which no longer exists, because the Governor in Council, who is responsible for defining the signal, never saw fit to do so for the obvious reason that, in practice, there is no requirement for it. For many years the services of pilots have been requested by radio long before ships reach the boarding station.

The scheme of the present legislation is based on free enterprise and independent, self-employed pilots, a situation that no longer exists in any Pilotage District in Canada. Free enterprise has been replaced by controlled pilotage so that assignments and earnings (whenever the pilots are not salaried employees) are shared equitably. Not only is this system not provided for in the Act but it is contrary to the basic principles of the Act, with the result that many of its most important sections are no longer applicable in any way.

It is considered that no attempt should be made to rejuvenate existing legislation by amendments. All indications point to a completely new Act tailored to meet present needs and based on altogether different principles. It should require Pilotage Authorities to play a much greater rôle in the control of the pilots and the service. Legislative reform is required in such depth that the fraction of today's legislation which may be worth retaining would not provide the necessary framework on which to build tomorrow's Act.

The new legislation should be drafted in simple, plain language, the organizational principles should be clearly set out and the sections grouped in logical sequence and arranged as simply as possible. (For further details see Recommendation 3.)

Since the Act is the foundation upon which the Pilotage Authority rests, the aim of the legislation is defeated if the Authority's powers, rights and responsibilities are not expressed in clear, simple, unambiguous and realistic terms. This fact is evidenced by the present chaotic situation: the Pilotage Authority no longer possesses or exercises any effective power and its rôle has been reduced to mediating between the pilots and the shipowners, always with conflicting interests.

RECOMMENDATION NO. 2

The new pilotage legislation to be a separate Act of Parliament

It is indeed surprising to note, first, the number of inadequate provisions in Part VI of the Canada Shipping Act that can not pass unnoticed, because they are so obvious; second, the extensive use being made of the illogical and illegal process of amending the Act indirectly by *ultra vires* regulations.

It is one of the principles of parliamentary procedure that the submission of a bill to amend legislation automatically places the whole Act before Parliament, however slight the amendment may be, a step whose consequences are unpredictable. Therefore, the Government is reluctant to introduce such bills unless the question involved is so important that it is impossible or impracticable to do otherwise. Furthermore, when such bills

are introduced, care is generally taken, as a practical way of limiting debate, to confine the amendment to the specific question at issue and consequently to exclude other amendments that may be desirable but are either less essential or are liable to cause controversy. An example was Bill S-3 (1959) which was proposed shortly before the St. Lawrence Seaway opened in an effort to deal logically with the new problems that were foreseen. The Bill attempted to amend the basic pilotage provisions with the aim of allowing flexibility and deleting sections that were no longer applicable. However, there was so much opposition that the Government decided not to put the Bill to a vote and it was abandoned. Bill C-80 (1960) was later introduced. In order to limit debate it dealt specifically with Seaway problems by the unsatisfactory method of legislation of exception. Nevertheless, this approach was successful.

The situation is also unnecessarily complicated by the fact that the Canada Shipping Act is a mosaic of a number of distinct and disconnected pieces of legislation that have as their only common denominator the fact that they are related to navigation and shipping. This causes serious drafting problems which are resolved at the expense of simplicity and clarity. Because of the rule of interpretation that in a given piece of legislation the same words should retain the same meaning throughout, definitions necessarily become either noncommittal or very involved. But the interpretation of any given provision becomes an intricate task on account of the other principle that a piece of legislation should be taken as a whole and that its separate provisions must be interpreted in terms of all the other provisions in the Act. Moreover, the present version of the Canada Shipping Act, which version dates from 1934, has always left much to be desired both in substance and drafting.

Another factor that has brought about this unsatisfactory state of affairs is the ease with which legislation is brought down by passing *ultra vires* regulations—and this with complete impunity. When changes in the structure defined in the Act itself become necessary and when all those immediately involved desire, or at least do not object to, the changes, legislation by regulation is a tempting, speedy and easy solution, despite the fact it is illegal. As seen in the Study of Legislation, this device has been regularly employed.

It is considered that the obvious way to resolve this problem is to make pilotage legislation the subject of a separate and distinct Act, as it was prior to 1906. On this point, it is interesting to note that when, in 1906, Canada adopted the consolidation formula that had been in force in the United Kingdom since at least 1854, the U.K. was about to revert to separate legislation for, in 1913, a new Pilotage Act was adopted there, thus implementing one of the recommendations of the Report of the Departmental Committee on Pilotage of 1911.

RECOMMENDATION No. 3

New legislation to be clear, uncomplicated, adaptable and flexible

Since pilotage legislation provides the basis on which a public service is performed, it should be drafted in terms that are easily understood by those who use it at any level. This aim can not be achieved unless the legislation is coherent in design and clear in presentation. An intricate law is likely to be confusing. In the field of pilotage, such a law would prove difficult for most users to understand and the inevitable misinterpretations would soon force pilotage administration back into the same state of bewilderment and illegality that now prevails. Simplicity and clarity can be achieved by adhering to the basic rules of drafting and of logic.

A service must meet a need and, as the need varies, the service must change. Since pilotage is a service providing experts in local navigation, one of its main characteristics should be sufficient flexibility to meet changing requirements in different places and at different times. After the Act establishes basic principles and the essential structure of the service, including provisions of general application and minimum requirements, the remainder of the legislation should be flexible enough to satisfy the varying requirements of the service. Adaptability and flexibility are two essential characteristics of legislation that will apply successfully to such a diversified service as pilotage in Canada.

The study of the present legislation contained in the first part of the Report exposed defects that ought to be avoided and, at the same time, has pointed out some of the ways the desired simplicity and clarity could be achieved, namely:

- (a) Use should be made of statutory definitions to restrict those natural definitions which are not precise enough for pilotage legislation, or to enlarge others to avoid repeated enumeration and a series of qualifying words. Key terms and expressions should be defined, such as "pilot", "navigate", "ship" and "compulsory pilotage" but meaningless, unnecessary or complex definitions should be avoided, e.g., the C.S.A. definitions in the present legislation of "Pilotage Authority" (subsec. 2(60)), "ship" (subsec. 2(98)) and "vessel" (subsec. 2(111)).
- (b) The basic plan should be as simple as possible, e.g., the present financial system is unnecessarily complex and subsection (p) of section 329 dealing with the delegation of power, to give an example, is awkward and obscure.
- (c) To make the Act easier to understand, principles and rules should be enunciated rather than implied by dealing with consequences or

exceptions, e.g., prior to 1956, the rule that only licensed pilots might be hired had to be implied from section 354 which merely listed the exceptions. No doubt it was found that the rule could not be enforced for lack of an express prohibition and finally, by the 1956 amendment, the rule was expressed in subsection (3) of that section. A similar misunderstanding exists as to the nature and extent of the surveillance rôle of the Pilotage Authority. Since this rôle is merely implied in the Act, there is a danger that it will be misconstrued and that the Pilotage Authorities will adopt a passive attitude toward it. In point of fact, this is precisely what has happened.

- (d) The new legislation should be construed logically and not in the haphazard fashion of the present Act. Each subject should be fully dealt with before passing on to the next one. There are two main ways to draw up legislation: (i) subjectively, i.e., by dealing in turn with each authority and its powers; (ii) objectively, by following the organizational structure and by dealing fully with each subject-matter before passing on to the next (as it is now done with the question of exemptions in secs. 346 and 347). A sequence based on the first method is neither normal nor the most logical as the present legislation has proved. This sequence was adopted in the 1873 Pilotage Act but, through subsequent amendments, the second method was introduced with the result that, at present, there is a combination of both with resultant confusion. For instance, in the 1873 Act, section 18 (which is the origin of the present sec. 329) was drafted to include the full extent of the regulation-making powers of the Pilotage Authority. The Act at that time provided only statutory fixed exemptions. When it was decided that there should be more flexibility, the provision allowing the Pilotage Authority to vary some exemptions by regulation was, however, inserted immediately after the section dealing with exemptions (now sec. 346) rather than including it in the former section (now sec. 329) as a further subject-matter of regulations.

The main reason for misinterpreting the subject-matters of the regulations appears to have been the fact that grouping them in one section took them out of the context of the other specific provisions of relevant direct legislation.

- (e) The new Act should also be drafted to conform with all statutes of general application, such as the Financial Administration Act (1952 R.S.C. c. 116), Regulations Act (1952 R.S.C. c. 235) and any provisions remaining in the Canada Shipping Act that might affect pilotage. If it is intended to deviate in any way, the exception should be clearly indicated.

The only practical way to achieve the necessary adaptability and flexibility is to delegate legislative power. Parliament should retain exclusive legislative control only over those sections of the Act which are of general application or have a permanent character. It is a practical impossibility to construct an Act which would cover in detail every individual requirement of all the pilotage services that exist, or may be created in the future, in the navigable waters of Canada's coasts, rivers, lakes, harbours and canals. Since a pilotage service is essentially governed by local peculiarities and requirements, it is impossible to set standards which would be applicable throughout Canada except for principles, the general outline of organization and essential minimum requirements. For instance, a service that will meet the relatively brief needs of harbour pilotage has very little in common with river pilotage, e.g., between Les Escoumains and Quebec, where the pilot's time and duty in charge of navigation averages 12 hours and may last much longer; or with coastal pilotage in a District such as British Columbia where the length of trips and the lack of land communications cause many administrative problems not met elsewhere. The structure is influenced by the number of pilots on strength. A very involved organization is needed if there are many pilots, e.g., in Quebec, Montreal and B.C., but such an organization would be meaningless and cumbersome in Districts where pilotage is performed by one or two pilots, e.g., Churchill and most of the small Districts in the Atlantic Provinces. The detailed organization of a pilotage service (and consequently of each District where the service is provided) is governed by local needs which can not be detailed in comprehensive legislation unless Parliament is prepared to approve, at least annually, the numerous amendments necessitated by changing requirements. Furthermore, such an Act would be so voluminous that the rules and organizational principles would be lost in a multitude of details.

The Act should also be drafted not only to meet the requirements of today but should also strive to provide rules, principles and a framework that would continue to apply for the reasonable future without constant change. Experience has shown that frequent amendments tend to be confusing.

However, this principle should not be carried to extremes. Experience has also shown that, unless effective controls are established, it is to be expected that the regulation-making authorities (re meaning of the term, vide C. 8, p. 243) will not fully discharge their legislative responsibility, with the result that legislation at the local level will continue to be incomplete, and administration will be arbitrary and illegal as at present.

From what has been learned from this study of the legislation, including the regulations, it is considered that the problem could be resolved if, *inter alia*, the following rules were observed:

- (a) Provisions of general application and permanent character should be covered in the Act and not by regulation. For instance, it is

essential for all pilots to be of sound mind and in good health, to have excellent hearing and eyesight. Again, no pilot should be permitted to practice his profession if he is wholly or temporarily incapacitated by illness or injury or if he becomes the victim of a detrimental habit. Equally, it is no less serious in one District than in another for a pilot to perform his duties while under the influence of drugs or liquor. There is no valid reason for leaving the making of legislation on any of these matters to the discretion of Pilotage Authorities with the possible consequence that they will be overlooked or inadequately covered.

- (b) The Act should establish general minimum requirements on any question where the following situation is found:
- (i) it is essential that there be a standard of qualifications established by legislation;
 - (ii) this standard can not be fully covered in the Act because of local variations;
 - (iii) there is a level below which this standard must not be lowered.

Pilotage Authorities would be authorized to pass regulations raising this standard to meet the special demands of their District but would be powerless to lower it below these minimum statutory requirements.

For instance, if the Act stipulated that a pilot should hold a certificate of competency, second mate coastal, as a minimum requirement for a licence, Pilotage Authorities would be prevented from granting a licence to a person who, although expert in local knowledge, was not qualified to take charge of the navigation of a vessel, a competence which the statutory definition of "pilot" would imply he possessed (vide Recommendation 13).

- (c) The Act should contain a set of provisions that are likely to apply in most Districts with the stipulation that such provisions may be varied (but not simply repealed) by regulations passed by each Pilotage Authority, if, and when, necessary, whenever failure to deal with such subject-matters would leave the legislation substantially incomplete. Such statutory provisions would become the law of the District unless amended by regulations.

This is the procedure that was adopted, and which worked well, to deal with the exemptions listed in subparagraph (e) of sec. 346 and sec. 347. Because the reverse procedure was adopted to cover granting exemptions to small vessels (except those registered in the British dominions) that is, the exemptions would be granted only if so provided in the District regulations and to the extent therein provided (subsec. 346(c)), this subject-matter is

inadequately covered (vide C. 7, pp. 227-228). Most Pilotage Authorities failed to make any regulations and the few who enacted legislation covered only a fraction of the problem. The result is that small vessels (except those registered in the British dominions) are subject to the compulsory payment of dues, an obviously ridiculous situation that led, in practice, to the non-enforcement of compulsory payment in these cases despite the resultant legislation. This highly irregular situation could not have developed if the procedure adopted for the exemptions listed in subsec. (e) of sec. 346 had been extended to subsec. (c).

If the Act had provided a standard form of pilot's licence which could have been modified by regulations to reflect whatever limitation the Authority was empowered to impose, instead of leaving the whole question of the form of the licence to be dealt with by regulations (sec. 333 and subsec. 329(e)), the present state of affairs would not have occurred. Since every Pilotage Authority has neglected to make appropriate regulations, no valid official pilot's licences exist, with the exception of those issued prior to the 1934 statute.

- (d) Finally, the confirming authority, when confirmation of a regulation is required, should be given a more positive and active rôle (for meaning of the term "Confirming Authority", vide C. 8, pp. 245 and ff.); its powers should be extended:
- (i) to provide *proprio motu* a District with essential regulations when its Pilotage Authority has failed to do so;
 - (ii) to correct and to amend regulations when submitted for confirmation, if they are substantially defective or *ultra vires*, or contrary to general pilotage and Government policies.

Care should be taken that these powers do not impinge unduly on Pilotage Authorities, and their limitations should be clearly stated in the Act, e.g., there should be no interference with discretionary provisions. (For further details, see Recommendation 19.)

RECOMMENDATION NO. 4

Control over regulation-making to be improved; proposed regulations to be examined for legality by a competent independent authority before submission for approval

The "regulations" herein referred to comprise the legislation made in the exercise of a legislative power delegated by Parliament, as defined by sec. 2 of the Regulations Act. In the field of pilotage, at present, such delegated

legislative power is exercised by two authorities: first, by the Governor in Council when he creates Pilotage Districts, fixes their limits, imposes the compulsory payment system and determines what signal a ship must display to indicate that a pilot is required; secondly, by the Pilotage Authority, principally when it establishes the criteria and rules under which the licensing power and its related surveillance power are to be exercised, but also in other matters, such as tariffs, exemptions, delegation of powers, licence and certificate fees, etc. (vide C. 8, p. 241 and ff.). Such regulations made by a Pilotage Authority are subject to confirmation by the Governor in Council, a requirement which was imposed as a measure of control to prevent misuse or abuse of this important power.

In support of the first part of this recommendation—that control over regulation-making should be strengthened—it suffices to refer to the situation revealed by the study of existing legislation contained in this part of the Report, which reveals that many pilotage regulations are illegal, apparently as a result of a deliberate abuse of this delegated power by the various Pilotage Authorities. The system must be improved, otherwise the same irregularities will continue. (For the proposed regulation-making procedure, vide Recommendation 19.)

It is also obvious that the present system of control is lacking in another area. The question of the legality of a proposed regulation is one among a number of factors which govern the function of approval. Other factors would include whether the proposed regulation is in agreement with general policies and whether, in the opinion of the confirming authority, the proposed modification is warranted for the District concerned. These are factors over which the confirming authority has discretion but, on the question of legality, there is no room for discretion and approval of an illegal regulation can not make it valid. It is essentially wrong that *ultra vires* regulations should be passed and allowed to stand because this constitutes an illegal usurpation of the powers of Parliament, whether done deliberately or not. Therefore, it is the primary duty of a confirming authority to ascertain that the proposed regulation is legal. The question of its pertinency is second in order of importance.

It is obvious that the confirming authority has, so far, failed to discharge this essential duty. Since it is realized that the Governor in Council, who is at present the confirming authority under Part VI, must be guided in these matters by his advisers, the cause of the error has been that, for one reason or another, these advisers have failed. It may be safely surmised that this has occurred either because they were not competent to judge the legality of the proposed by-law or because they were not in a position to give unbiased advice, or both.

The first alternative requires little discussion. A legal opinion on pilotage matters must necessarily come from a legal adviser who, in addition to his other qualifications, has an expert knowledge of all pertinent legislation.

This is not limited to the Canada Shipping Act but also includes: (a) other miscellaneous statutes like the 1860 Quebec Pilots' Corporation Act or the Quebec Trinity House Act which still has some application with regard to the Quebec Pilot Fund; (b) whatever pre-Confederation provincial legislation is still applicable; (c) other Federal statutes which affect pilotage legislation directly or indirectly. He must also be thoroughly conversant with the existing regulations of the District concerned to ensure that, from the legal point of view, a proposed amendment does not conflict with the rest of the regulations.

It is believed that the second alternative has been the main weakness of the system. The Royal Commission on Government Organization, when dealing with the functions of lawyers holding legal positions in departments, pointed out (Vol. 2, p. 397) that these lawyers "are not always principally concerned, like the Department of Justice lawyers, with determining whether matters referred to them are legal or illegal; rather their function is quite often to devise procedures to implement administrative policies". The confirming authority must have relied too much on these legal advisers, not realizing that they were not in a position to give the disinterested and unbiased opinion the situation required.

It is essential to obtain such an opinion from a legal adviser who, besides being an expert on pilotage legislation, is not part of the pilotage organization but is in an independent position with no responsibility for elaborating the policy being implemented by the regulation. It should be a matter of complete unconcern to him whether the regulation is approved or not.

It is considered, however, that it would be unwise to subordinate the exercise of the regulation-making power to any additional control beyond that of the confirming authority. The report of the legal expert should be considered merely an opinion made available to the confirming authority to assist it to decide what course of action should be taken. Responsibility for approval should rest with the confirming authority but a valid legal opinion should be an essential prerequisite. Whenever an amendment is made to the proposed regulation, even if it is effected by the confirming authority *proprio motu*, a second legal opinion should be obtained. As a means of control, each regulation should carry a certification from the designated legal authority merely to the effect that this formality has been observed without disclosing the nature of the opinion given.

It is considered that the indicated authority for this legal review is the Deputy Minister of Justice and that this requirement should be imposed by an appropriate provision in the Act.

RECOMMENDATION No. 5

A procedure to be provided to keep pilotage legislation up-to-date

It is considered that there should be an appointed group with the responsibility of ensuring that pilotage legislation does not become out-dated. This group would take note of new and changing needs in pilotage and would scrutinize other legislation passed by Parliament to detect any provisions that might come into conflict with, or indirectly amend, pilotage legislation, so that the appropriate amendments could be submitted to Parliament as soon as necessary. If, in the past, approval had been systematically refused to all regulations (i.e. by-laws) that were *ultra vires*, and if the need for the measures that were sought had been genuine, the responsible authorities would have been forced to seek from Parliament the appropriate amendments to the Act. In the process, pilotage legislation would have been gradually revised. Therefore, implementation of the foregoing Recommendation No. 4 would have the indirect effect of helping to keep legislation up-to-date.

It is incredible that existing pilotage law has so completely ignored the numerous changes and considerable progress of the past hundred years in the fields of navigation, shipping and communications that most of the provisions of Part VI are verbatim repetitions of those contained in the 1873 Act which were intended for ships of that period.

The problem, however, is not peculiar to pilotage legislation but appears to be a common evil that plagues most types of legislation both in Canada and in most other countries. Jurists have studied the question and have suggested remedies. Some Governments have adopted various kinds of remedial action. For instance, in the United Kingdom, the task of revising the law is now the responsibility of the Law Commission, a standing commission established by the Law Commission Act of 1965 (Ex. 1502). It is reported to be exceptionally successful.

Dr. G. F. Curtis, Dean, Faculty of Law, University of British Columbia, made a special study of the question in a paper he presented at the Third Commonwealth and Empire Law Conference in 1965 (Ex. 1496). He remarked that the Royal Commissions and Minister's committees appointed from time to time to inquire into a particular branch of the law or legal administration "cover, in sum, but a small part of the law, . . . and . . . they are appointed *ad hoc*, and do not supply the element of continuity of review". He added that:

"Occasionally a Royal Commission or a Minister's committee is empowered to engage a research staff. For the most part, however, the process of statutory amendment has to operate without this sort of assistance. Much legislative change is patchwork, taking form hastily in response to immediate pressures. It is not preceded by study in depth, either as to the form it should take or the effect it will have on the main body of the law. The legislative draftsman under such conditions must do the best he can working from incomplete data. The disordered state of a

good deal of our statutory law, and its obscurity, is the staple of judicial and professional complaint, not always justified, but at any rate sufficiently well-grounded to warrant efforts being made towards remedy."

He remarked that "The need is for continuity of review and systematization of materials". His review of the revisory experience of the Law Revision Commission of the State of New York, which took final form in 1934 as a permanent agency, led him to the conclusion:

"Nothing less than an official body, well financed, well staffed, and having as its mandate the review of the whole of the law and its administration, seems capable of meeting the need."

It is realized that the recommendation of Dean Curtis is beyond the scope of the mandate of this Commission but the state of existing pilotage legislation is a clear example of a law that has fallen behind the times. In this field, it is the duty of this Commission to recommend that a procedure be laid down so that any new pilotage legislation passed by Parliament will not be permitted to lose touch with reality and become out-dated and inoperative.

RECOMMENDATION NO. 6

The new Pilotage Act to be fully comprehensive and to contain provisions applicable to all aspects of pilotage

Pilotage in Canada is characterized by its great diversity. In none of the fourteen foreign countries where pilotage legislation was studied (App. XIII) did the Commission find as many different situations as exist in Canada and need to be covered in a comprehensive pilotage law.

Pilotage legislation in Canada should cover, *inter alia*:

- (a) the full range of pilotage services;
- (b) service provided in organized pilotage Districts as well as in non-organized areas;
- (c) pilots of every status: employed by the Government or private companies, quasi-employees and self-employed;
- (d) pilotage services provided through private or public enterprise;
- (e) pilotage ranging in importance from an essential public service to one provided only for the convenience of shipping;
- (f) organizations that are self-supporting and those that are not but which, nevertheless, require to be maintained in the public interest;
- (g) existing services and those that are required but do not exist and, hence, should be created and maintained.

The most significant failure of existing pilotage legislation results from the limited and restricted concept of the pilotage service to which it applies

because Part VI C.S.A. is, in fact, no more than *ad hoc* pilotage legislation and, hence, is inadequate when applied to pilotage situations for which it was not devised. In essence, pilotage legislation in Part VI is simply licensing. The only permissible State control is power to debar from the pilotage profession any person whose assessed qualifications do not meet the required minimum standards, and licensed pilots whose qualifications are subsequently found wanting.

The Canada Shipping Act refers only to pilotage services which are in existence and no authority is granted to create a service where none exists, even if it is required in the public interest.

Under the present Act, the service must be financially self-supporting and the compulsory payment system is only a means of raising more revenue. But when dues have been raised to the maximum permissible level and a pilotage service still can not be self-supporting, there is no alternative but to abrogate the District and, therefore, to end the State's administrative control over the service. Direct or indirect expenditure of public money to maintain a local pilotage service is not permissible (vide C. 5). Hence, those Districts which have relied on public funds to meet a large proportion of their expenses, e.g., Halifax, Saint John, N.B., and Sydney, should have been abolished unless appropriate increases in pilotage rates were sufficient to keep them financially independent.

The Act applies only to free enterprise where pilots are self-employed, independent contractors who vie with each other for pilotage clientele and whose sole permissible remuneration is derived from the dues earned, less their operating expenses. The provision of pilotage services to shipping by pilots who are employed either by the State or a private concern, or who are quasi-employees, i.e., they are no longer free to enter into a pilotage contract but are directed by an authority, is completely incompatible with the existing Act.

A Master can not be deprived of his right to choose his pilot except in the exceptional case, provided for in sections 349 and 350 of the Act, when a pilot is imposed on him by chance and not through an ordered assignment.

Compulsory pilotage in the full meaning of the word is inconsistent with existing legislation (C. 7, p. 207), so much so that, when Canada was obliged to make pilotage compulsory in the Great Lakes Basin, legislation of exception (Part VIA) had to be passed. Under Part VI, pilotage always is optional.

The pilotage legislation of Part VI was conceived for port pilotage and its governing aim is the convenience of shipping. Pilotage was not given the status of a public service in which public interest transcends private interest nor was safety of navigation considered, except remotely (vide C. 3, p. 44). With such a limited concept of the rôle and importance of the pilotage service, it is only logical that Pilotage Authorities are guided by what the

shipping interests consider to be to their best advantage. It is a matter of record that Pilotage Authorities have generally yielded to shipowners' requests and have refused them only because the requests were quite unacceptable to the pilots or were considered unjustified to the extent of jeopardizing the efficiency of the service. Most basic changes have been made simply because the shipping interests yielded to the constant, persistent pressure of the pilots which, on more than one occasion, took the form of a strike.

This limited concept was already unrealistic and retrograde when it was introduced in 1873 in the first post-Confederation pilotage legislation. It is completely inadequate today because pilotage now exists principally to facilitate water transportation, to make navigation on Canadian waterways less hazardous and, thereby, to enhance the national economy.

Before Confederation, the vital importance of the St. Lawrence River as a means of communication and transportation was fully appreciated and no effort was spared to make it navigable throughout. In 1849, the Government of Lower Canada, realizing that navigation on the River remained hazardous, despite all the public money spent on improvements and aids to navigation, took a further step toward improving navigation by compelling Masters to turn over the navigation of their ships to Quebec branch pilots between Bic Island and Quebec (12 Vic. c. 114 secs. 53, 54 and 55). In 1864, similar compulsory pilotage was extended as far as Montreal (27-28 Vic. c. 58). In 1860, the free enterprise system was abolished in what was to be the Quebec District and replaced by fully controlled pilotage because both shipowners and pilots realized that the free enterprise system was not capable of providing an efficient and reliable essential service. At their own request, the Quebec pilots were grouped in a compulsory public corporation with full control over operational services, administration, despatching and pilots' earnings.

Ships have undergone great structural changes since 1873. They are now much larger and faster and have less manoeuvrable space in restricted waters, with the result that rivers, harbours, channels, canals and locks are frequently used to their extreme margin of safe capacity. Under these circumstances, local knowledge in some areas must now be complete and accurate for all occasions. Masters who do not possess such precise knowledge have a great need for pilots and, in certain areas, can not dispense with their services (*vide* C. 3, pp. 41 and ff.). It would be unrealistic to continue to make Masters of foreign ships, some of whom may have little or, in some cases, no experience in Canadian waters, responsible for deciding whether or not to take a pilot, thus possibly endangering navigation. Disruption of water-borne commerce is unacceptable. International sea-borne trade is so essential to Canada that, in certain areas, maritime disasters, or the suspension of pilotage operations, or even official acquiescence in a pilotage service of doubtful efficiency and quality, will seriously affect the national interest.

Since 1873, the importance of the various pilotage services to the economy of the country have become progressively more apparent and, for this reason, the Government has felt justified in intervening more and more in the pilotage field, mainly by:

- (a) spending public funds for the payment of District operational expenses (vide C. 5, pp. 116 and ff.);
- (b) assuming full control in all the main Pilotage Districts over both pilotage operations and the pilots themselves, thereby abolishing the free enterprise system and the right of Masters to choose their pilots (vide C. 4, pp. 76 and ff.); and
- (c) centralizing local administration in the Department of Transport in Ottawa (vide C. 3, pp. 58 and ff.).

This intervention, which altered the nature of the service, was taken on the ground of public interest, despite the spirit and the letter of the Act which remained unchanged, with the result that the principles of existing pilotage legislation are in constant conflict with reality and have been the main cause of the many administrative difficulties experienced ever since.

From the service point of view, pilotage has been defined as the ultimate means to enhance safe and speedy transit of ships through confined waters. It is a *public service* in the full sense of the word when it is controlled, maintained or provided primarily to serve the superior interests of the State; it is a *private service* when its main purpose is to serve private needs, but safety remains the principal aim in both cases: in the former, "safety of navigation" through Canadian waterways; in the latter, "safety of the ship", including safety of privately owned port installations.

Whatever the reason for the existence of a given service, the public derives advantages from it, although in varying degrees. As for any other occupation or profession, the extent of State interest is the measure of permissible State intervention in the freedom of the exercise of the pilot's profession. In some areas, pilotage is a public service in its fullest sense and the State is justified in taking complete control; in others, public interest is only incidentally involved and State control should be kept at a minimum.

No other maritime country has a situation such as obtains on the 2,280 mile long St. Lawrence-Great Lakes waterway where safety of navigation and the speedy transit of maritime traffic are so essential to the national economy. The blockage of a channel or canal in one section may well be reflected in a slowing down of traffic throughout the entire system and, in some cases, actual stoppage.

Port pilotage does not attain the same degree of importance but, on the other hand, any given port may assume greater importance than others by being geared to meet government planning for strategic or transportation purposes in the national interest. In that event, the importance of such a port

would become such that everything must be done to ensure safety of ship movement in order to avoid, as far as is possible, any interruption of maritime traffic.

Comprehensive pilotage legislation should provide for all these situations and authorize the extent of control warranted in all circumstances by the interest of the State. In some cases, legislative control will suffice while, in others, varying degrees of administrative control—ranging from licensing to full control of the pilots—will be required.

The extent of the Crown's financial involvement is also governed by the same national interest depending on the circumstances.

RECOMMENDATION No. 7

The scope of application of the new legislation to be extended to permit the effective use of pilotage as the ultimate means to achieve safety of navigation and safe, speedy movement of ships when required by the country's superior interest

Except indirectly, the original aim of existing pilotage legislation was not to enhance safety of navigation; no vessel plying Canada's navigable waters (except in the Great Lakes Basin through a law of exception, i.e., Part VIA C.S.A.), could be compelled to employ a pilot at any time and under any circumstance. The purpose of the legislation was merely to provide a pre-selection of pilots for vessels which would normally require their services. Hence, it was logical to restrict the application of the law to such vessels and make it inapplicable to a large number of others, i.e., those not originally included in the statutory definition of "ship" which dates from the time of sailing ships. Evolution in the construction of vessels and their means of propulsion have long since made the original distinction between "ship" and "boat" meaningless and, if this distinction is to be retained, a new definition should be found. The exclusion of "boats" from the application of Part VI C.S.A. has become an unrealistic restriction which Pilotage Authorities have tried to correct by using the generic term "vessel" in their by-laws.

As explained earlier (vide C. 7, pp. 213 to 220), the complex but restrictive definition of the word "ship" and the ambiguity of the term "navigate" used in sec. 345 C.S.A., as limited by the terms "remove" and "move" in sec. 357, have caused serious problems of interpretation and the numerous judicial interpretations are often contradictory. This unsatisfactory situation should not be allowed to continue.

For the purpose of new pilotage legislation, the present statutory definition of "ship" is too ambiguous to be retained. Furthermore, legislation governing pilotage which, in given circumstances, is an essential public

service, can not be limited in its application to a restricted group of vessels unless it is unlikely the excluded vessels will become safety risks.

An efficient pilotage service is the most effective means of achieving safety of navigation and the safe speed movement of ships because it provides local experts for Masters who lack the required local knowledge. The scope of application of the Act should be all inclusive so that pilotage may be imposed on any vessel considered to be a safety risk in the local circumstances unless navigated by a competent mariner possessing the required local knowledge where (a) local pilotage is essential, (b) a shipping casualty is likely to interfere seriously with water-borne traffic, and (c) such interference would greatly prejudice public interest. Furthermore, vessels that are not ships should not be deprived of the right to obtain the services of a pilot if the Master so requests and the Pilotage Authority should have the power to fix by regulation the appropriate rates for services rendered by pilots to those vessels. Both this right and this power are at present denied under the legislative provisions of Part VI because its scope of application is limited to "ships". To achieve this, the scope of the Act must be enlarged to apply to all vessels as defined below. This requires, *inter alia*, that such key terms as "vessel", "navigation" and "pilot" be given the widest possible meaning in appropriate statutory definitions.

The generic term "vessel" should be used instead of "ship" and its statutory definition should be broad enough to encompass all water-borne objects being navigated, whether under their own power or moved by other means, i.e., whenever their movement is controlled and directed by man. A vessel should mean the whole unit of navigation, irrespective of the number of its components.

Under such a definition, "vessel" would mean and include for pilotage purposes not only what are now referred to as boats and ships but also any water-borne object that is being towed, such as a boom, raft, barge, scow or even a crib being towed to its position. All the components that participate in a particular act of navigation would be considered one vessel, one unit of navigation at that moment, e.g., the tugs that assist in berthing or unberthing a ship, whether or not the ship's engines are used, would be considered one vessel together with the ship they assist. Similarly, a tug and its tow, whether it is another ship, a barge or a string of barges, or rafts, would be considered one vessel. All such components are, in fact, only one unit of navigation under the direction of one navigator.

A definition of this magnitude would not fit into the composite legislation of the Canada Shipping Act but it has an obvious place in an Act designed to promote safety of navigation. Since all water-borne objects, including rafts and booms whose individual safety is of relatively minor importance, may become serious navigational hazards if they are improperly handled, it is pertinent that provisions to control their navigation should be included in pilotage legislation.

For the same reasons, the terms “navigation” or “navigate” should be given the broadest possible meaning. To avoid past controversy, navigation should be defined as “any movement that a vessel (as defined above) makes or is caused to make under the direction and control of a person in charge” or words to that effect. A vessel would then be considered as being navigated whether or not the vessel is using its own propulsive power. Hence, if the person in charge causes a vessel to be moved by external means—current, winds, mooring lines, or tugs—the vessel is being navigated for the purpose of pilotage legislation. Thus, the only situations when a vessel would not be navigated would be when immobilized, i.e., made fast to the shore or at anchor or aground, or when not under the control of any person, e.g., when adrift and out of control. If it should be necessary to deal with a specific type of vessel, e.g., for compulsory pilotage, or for a specific type of movement, this could be readily indicated in the legislation by the use of appropriate qualifying words.

The statutory definition of the term “pilot” contained in subsec. 2(64) of the Act is adequate as to substance but, as to form, should be modified to remove ambiguity and thus avoid the numerous misinterpretations and controversies caused by the present wording. Specific comments and proposals were made on this subject in C. 2, pp. 21-33. The term “ship” in the definition of “pilot” should be replaced by “vessel” as above recommended.

The definition of pilot, however, should not prevent new legislation from dealing with other types of navigational assistance that can be given to Masters by persons not belonging to a vessel. When and where it is necessary to deal with other types of assistance, appropriate wording should be adopted to avoid any ambiguity.

RECOMMENDATION No. 8

The Pilotage District to remain the unit of organization

Essentially, an organizational plan is subordinate to the enterprise or service for which it exists and must be drawn up accordingly. Hence, there can be no standard method of organizing dissimilar enterprises and services. Pilotage is no exception to this rule.

A pilotage service is essentially local in character and is subservient to the needs of those vessels for which it is provided. A pilot is differentiated from other competent mariners by the specific knowledge and skill he has acquired to make him expert in the art of navigating in certain waters outside which he ceases to be a pilot. The type of assistance needed by ships in a given locality determines both the nature of the pilotage services provided and the organization which supports them. Except for a few general principles, the system of organization varies from area to area and is materially

influenced by local peculiarities and circumstances, with the result that the rules which are appropriate in one locality may not apply in another.

Hence, the factors which determine the size and organization of each District should be the nature and extent of the pilotage services provided. The more difficult navigation is in given confined waters, the more limited should be a pilot's range of operation in view of the intimate knowledge he must always possess of the peculiarities, hazards and changing conditions of those waters, and the constant experience he needs to maintain his competence. The establishment of a large District suggests either that navigation within its limits offers few serious difficulties or, if this is not the case, that its pilots obtain only general qualifications because, for practical reasons, it is not feasible to train the specialists the term "pilot" essentially connotes.

The two main purposes of a complete body of pilotage legislation are to create the necessary machinery:

- (a) to define the qualifications required of pilots, and to determine that pilots meet these qualifications;
- (b) to direct and, if necessary, provide pilotage services when and where required in the national interest.

Both aims must be related essentially to the restricted area for which pilots are qualified. The efficiency of the organization is in direct relation to the degree of intimate knowledge the Authority has of the nature, peculiarities, conditions, circumstances and problems of the District. In other words, each District Pilotage Authority, together with its officers and advisers, must be expert in its own field.

Normally, there should be one District for one homogeneous group of pilots, whether the service existed prior to the Crown's intervention or whether it is organized and provided by the Crown, unless more than one group of pilots are engaged wholly within the same, or part of the same, area. In the interest of efficient organization and administration, part or parts of a given Pilotage District might, in certain circumstances, be served by one or more separate groups of pilots, e.g., the Montreal River (upper part) pilots, and the Montreal Harbour pilots, both of whom perform pilotage in the harbour of Montreal. For organizational purposes, both groups must come under the same authority. If, however, the river pilots ceased to be legally competent in the harbour, the harbour area should be segregated and made a separate District. The Montreal District should have been divided into two separate Districts in 1959 (this would have required an amendment to the Act) when the pilotage trip between Quebec and Montreal was divided at Three Rivers to allow the service in each sector to be performed by a separate group of pilots. It is also irregular to issue to the pilots of both groups (as is now done) a licence which vouches for their competency in both sectors, despite the fact that they actually pilot and, therefore, maintain their competency in only one.

The principle of one District for each distinct pilotage service may be departed from in special circumstances for practical reasons. In the organization of pilotage (except for essential basic principles) there should be as few hard and fast rules as possible. One of the main characteristics of good pilotage legislation is flexibility to permit the application to the many different situations that exist.

First, there are small ports where pilotage is required and pilots are available but traffic is only occasional or is insufficient to keep more than one or two pilots reasonably employed. In these ports, pilotage is not an essential public service and the limited administration involved should not extend beyond licensing and its corollary: surveillance, reappraisal, regulation-making and rate-fixing, but not control of operations. In these circumstances, the difficulty and expense of organization do not warrant making each port the separate District it should theoretically be. Provided these ports are in the same geographical area, the merger type of District is indicated, e.g., the system which was adopted in Prince Edward Island for these same practical reasons and which works remarkably well (vide C. 3, pp. 47 and 48). The governing factor as to the extent of the merger is what area the Pilotage Authority can be reasonably expected to control effectively in the light of local circumstances and the extent of the duties and responsibilities imposed upon it. The five P.E.I. port pilotage services are neither integrated nor interconnected but are grouped solely for administrative purposes.

In the merger type of organization:

- (a) ports should not lose their physical identity;
- (b) their waters should not be artificially connected by stretches of open water where pilotage is not required (which is the defect of the present organization in the Prince Edward Island District);
- (c) as far as regulations, licensing and rate-fixing are concerned, ports should be treated as separate service areas, e.g., the Montreal District By-law which contains two separate provisions for harbour pilots and river pilots.

Secondly, there is the situation that obtains when no pilot is available locally and the demand for pilotage does not warrant the establishment of a permanent pilot station because of the required organization, including boarding facilities, e.g., the approaches to Kitimat in the B.C. District. The practical solution in this case is to attach such an area to an existing District whose pilots provide the necessary service until conditions permit the creation of a separate District. Meanwhile, the quality of the service depends on the experience District pilots are able to acquire in that locality; there will be little opportunity to gain experience if the occasional assignments are spread among all the pilots.

Thirdly, isolated areas or ports in the vicinity of a Pilotage District, which have their own pilots (e.g., the lower St. Lawrence ports situated outside the Quebec District), may also be joined to that District (but not the non-pilotage waters between them) for the purpose of licensing and rate-fixing only, thus obtaining all the advantages of a Pilotage District and, at the same time, being relieved of the burden of administration. In such a case, the licence of the pilots of the District would not extend to the attached area or port, and vice versa, and the District regulations should contain *ad hoc* provisions which meet the local needs of these attached ports.

Fourthly, since much of Canada's coastline remains uninhabited, many areas have few, if any, pilotage requirements at present. As long as these conditions prevail, the creation of Pilotage Districts is not warranted in them and they should remain unorganized areas. The nature of the pilotage service in such unorganized areas is the subject of Recommendation 10.

If possible, there should be one pilotage trip inward or outward, provided this does not involve unusual working hours under normal conditions. For longer trips, the pilotage area should be divided into separate contiguous Districts and pilotage performed by different groups of pilots. The criteria governing demarcation lines are:

- (a) the area in which the pilots may reasonably be expected to acquire their qualifications and maintain their competence;
- (b) the period of duty which is considered normal under the navigational conditions generally encountered.

The problems created by the contiguity of Districts are dealt with in Recommendation 9.

Pilotage is a service and, hence, can not exist where it is not needed. The service is required when the navigation of confined waters poses problems that can be solved only by local knowledge and experience, but in areas where no particular navigational difficulties are found, there is no need for pilotage and such areas should neither be established as Pilotage Districts nor included in an existing Pilotage District. Therefore, open coastal waters and any large body of water—gulf, estuary or lake—where navigation is conducted in its normal manner should not be included in Pilotage Districts. For this reason, it would be unnecessary and unrealistic to include in pilotage waters the open waters off the coast of the Atlantic provinces, the Gulf of St. Lawrence or Hudson Bay. However, in certain cases, stretches of open water must be included in a Pilotage District as a necessary accessory to provide service, but such inclusion is merely incidental because circumstances make it necessary to do so. The most common example is the boarding area which should be located in open water to allow vessels room to manoeuvre in all types of weather when embarking or disembarking pilots. Comparatively long stretches of open water may be included when it

is either impossible or impracticable to provide a boarding area near the approaches to confined waters, e.g., most ports in the northern sector of the B.C. District are in this category at present. This situation should not continue to exist when conditions change and the traffic justifies a boarding area near the approaches to confined waters. Therefore, in these circumstances, whether or not open waters are included in a District depends upon the provision of pilotage services for confined waters.

RECOMMENDATION NO. 9

The Act to provide for the problems of contiguous Districts

Existing pilotage legislation totally ignores the problem of providing ships in transit with uninterrupted pilotage service when they reach the boundary between contiguous Districts. The result is that the Authorities of such Districts are faced with legal issues for which the Canada Shipping Act offers no solution and, at the same time, the pilots are constantly forced to act in an illegal manner (vide C. 3, pp. 48-51).

The Pilotage Authorities of contiguous Districts have no power beyond the limits of their own District and, therefore, can not order their pilots to pilot beyond the limits of their District, even to change over. They also lack the power to extend by agreement their respective jurisdiction to cover a zone adjacent to the common limit of the Districts. The two Pilotage Authorities concerned can not legally come to any agreement to solve these problems because a Pilotage Authority can not make regulations and fix tariffs for pilotage performed either outside its District by its own pilots or within its District by pilots of the other District who are not licensed for its District.

Once a pilot crosses the limit of his District, he is considered unlicensed (C.S.A. subsec. 333(3)). If he continues piloting while waiting to be relieved by a licensed pilot of the other District, he acts illegally and is liable to be prosecuted (sec. 356) unless he decides to do so for the safety of the ship in the absence of a licensed pilot, in which case he is entitled to part of the remuneration of the other pilot for services rendered until he was superseded (sec. 355). However, a pilot is not obliged to stay with a ship even for a question of safety; he has the absolute right to quit a ship "as soon as she passes out of the pilotage district for which his licence extends" (sec. 361) and, therefore, is not obliged to await the arrival of a relieving pilot (vide Recommendation 11).

In addition, both Districts are autonomous and their respective Authorities are quite independent of one another, despite the fact that shipping needs an integrated pilotage service from District to District in order to provide uninterrupted service for ships in transit.

The situation has been well handled up to now by mutual agreement, mainly due to the fact that most contiguous Districts have the same Pilotage Authority, i.e., the Minister. But these are artificial solutions. If the Pilotage Authorities concerned fail to agree, there is no mechanism for reaching a binding decision, to the possible prejudice of the service.

Up to about 1935, the Quebec and Montreal Pilotage Authorities each operated their own independent pilotage station in Quebec City, although the Minister had been the Pilotage Authority of both Districts since 1905. It was realized that, in view of their inter-relation, operational efficiency indicated a single despatching service with one pilot station. Although these were not authorized by the Act and no mention was made of them in their By-laws, unification was effected by combining the two pilot stations at Quebec into one under the authority of the Quebec District Supervisor who then exercised full authority over the pilots of both Districts when they were in Quebec Harbour. This was done as early as 1935, as is evidenced by the case of *Gariépy v. Boulay* (Ex. 1466(d)), when the Montreal pilot Gariépy appealed against the sentence awarded him by the Quebec District Superintendent for not obeying a despatching order August 30, 1935.

The same situation applies to the other St. Lawrence River Districts which share a district limit and to the Districts of New Westminster and B.C. with the difference, however, that they have no joint territory at their common boundary such as the Act provides for the Districts of Quebec and Montreal. This has created serious administrative problems at St. Regis (vide Part IV Pilotage District of Cornwall) and even at St. Lambert Lock (vide Part IV Pilotage District of Montreal). The legality of the orders given to pilots by a Supervisor of another District or by his staff has not yet been challenged but it would appear that these orders are legally invalid in the absence of jurisdiction and for lack of delegation through By-laws (subsecs. 327(2) and 329(p) C.S.A.). Furthermore, the pilots of each District continue to be governed by their own regulations with the result that both groups, while acting in the same territory, are governed for surveillance and disciplinary purposes by different legislation. In the Gariépy case, the right of the Quebec District Superintendent to assign and judge a Montreal pilot was not questioned; the judgment was quashed, not for lack of jurisdiction, but on account of abuse of power by the Superintendent.

In order to ensure continuity of pilotage service from one District to another, the Act should provide for establishing joint territory at the common boundary and integrating auxiliary services at the changeover point.

The Act should first require the establishment, inside the territory of one District next to the common border, of a boarding zone in which the pilots of the contiguous District may legally navigate to commence or terminate a pilotage trip to or from their own District. For other purposes, the area in question should pertain exclusively to one District, e.g., movages

should be performed only by the pilots of the District in which the territory is located, unless a move from anchorage to berth or vice versa, or from berth to berth, is merely the continuation or the beginning of a trip from or to the contiguous district.

The Act should provide that the pilots of contiguous Districts come under the authority of the Pilotage Authority of the District in which the joint territory is situated for the purpose of surveillance and despatching. That Authority would then be automatically considered the legal representative of the Pilotage Authority of the contiguous District and, therefore, would be bound by its legislation and despatching rules.

The duplication of auxiliary services at the changeover point should be prohibited; the Act should empower the Pilotage Authorities of the Districts concerned to make agreements for the provision of joint auxiliary services, subject to the approval of the Central Authority. Any disagreement should be settled by the Central Authority and, if the District Pilotage Authorities concerned fail to provide the necessary joint auxiliary services, the Act should provide the Central Authority with power to take the necessary decision in lieu of the District Authorities, after these Authorities and all other interested persons have been given the opportunity to present their views (vide Recommendations 17, 18 and 19).

RECOMMENDATION NO. 10

Non-organized areas to be subject to limited pilotage control

It would be both illogical and impractical to insist that pilotage services be available in all navigable waters of Canada as would be the case if they were all divided into, and completely enclosed in, Pilotage Districts. As pointed out in Recommendation 8, no area of open water should normally form part of a Pilotage District because pilotage services are not required. However, there are other areas where, although pilotage might be warranted because of special local conditions, it is of little economic importance, for the time being, whether or not vessels transit or navigate them speedily or, in fact, can navigate them at all without the services of a pilot. Therefore, until the situation changes, these areas should not be demarcated as Pilotage Districts.

However, neither the Act nor those responsible for its implementation should ignore the private pilotage services that are, or may be, provided in these areas. Reasonable assistance should be extended to encourage those who provide, or may wish to provide, pilotage services in these unorganized areas but, at the same time, minimum control should be exercised to ensure the quality and reliability of the services thus provided. This could be achieved:

- (a) in a general way, by providing legislative control through statutory provisions designed to protect both shipping and those who pilot in good faith;
- (b) more particularly by extending the administrative control of licensing as far as practicable.

Specific matters that should be the subject of such statutory provisions of legislative control are dealt with in Recommendation 11.

As for licensing, there are practical obstacles that preclude its general application. As recommended in Recommendation 8, when the areas in question are not unduly remote from an existing District, it is considered they should be attached to it for licensing, surveillance and rate-fixing only, thereby granting their pilots the status of licensed pilots with all the privileges this status entails.

When such an affiliation with an existing District is not feasible, every effort should be made to recognize the qualifications of the pilots providing the service. The Act should specify that persons performing pilotage, or willing to pilot, in such areas are entitled to have their qualifications appraised. The appraisal function, as well as the surveillance and reappraisal this entails, should be made the responsibility of an existing (normally the nearest) District Pilotage Authority to be designated by the Central Authority. When a District Pilotage Authority has already been made responsible for one pilot in the area, it should automatically be responsible for other persons in the same area wishing to have their qualifications approved.

It is considered that appraisal and surveillance should be made the responsibility of an existing District Pilotage Authority because the rare cases likely to occur do not justify the creation of a specific organization for that purpose and that the responsibility should be placed with the District Pilotage Authority rather than the Central Authority because the former already is familiar with the problem of licensing and also because such functions do not fall within the ambit of activities of the Central Authority.

Because these are only *ad hoc* cases, the standard of qualifications and the terms and conditions of appraisal should be left to the entire discretion of the appraising authority (i.e. the designated Pilotage Authority) which should base its decision on its experience in that field and the requirements of the services for which the pilot is being appraised. However, this should not prevent the Pilotage Authority concerned from making specific regulations to cover these cases, or indicating, either in regulations or in the appraisal report, that specific regulations apply (vide Recommendation 18).

A distinction should be made between these pilots and those licensed for a Pilotage District so that the former will not be mistaken for the latter,

as is being done by countries where a similar procedure exists. A suitable appellation might be "approved pilots". The appraisal finding, together with its terms and conditions, including the limits of the waters in which the pilot's qualifications apply, should appear on the document of approval.

Such a document will give the pilot concerned only official recognition of his qualifications to navigate in the defined area but will not grant him the privileges pertaining to licensed pilots, e.g., the right to supersede a non-approved pilot. The names of approved pilots, together with a description of the limits of their jurisdiction, the necessary information how to obtain their services and a definition of the term "approved pilot", should appear in all official publications dealing with navigation in the areas concerned. A similar system exists in the United Kingdom with respect to coastal pilotage (vide App. XIII).

RECOMMENDATION NO. 11

The Act to contain legislative provisions of control for the protection of pilots, shipping and the general public

Whenever pilotage is provided, even by a person whose competence has not been officially assessed, either within a Pilotage District when such exceptional action is permissible or outside a District, it always remains a service from which the public derives at least some benefit. Hence, Parliament is justified in intervening generally in the pilotage field by providing legislation of general application aimed at improving the quality and reliability of the service wherever it exists, while also granting protection to those who provide *bona fide* services.

As demonstrated in Chapter 2 (pp. 33-37), Part VI C.S.A. contains such general provisions, but this is not obvious because the language of these provisions does not indicate their general scope and because they are combined with provisions dealing specifically with organized pilotage. It is considered that the new Act should contain such general provisions of legislative control and that they should be drafted so as to leave no possible misunderstanding about their scope of application.

The present statutory definition of the term "pilot" becomes a prerequisite in pilotage legislation designed to cover the whole field of pilotage. The suggested modifications in Recommendation 7 do not alter this basic situation since their aim is simply to improve the existing definition. Hence, when the term "pilot" is used alone (unless the contrary appears from the context), it means any person not a member of a ship's complement who navigates that ship at a particular time. This person, licensed or unlicensed,

registered or approved, deserves official recognition and basic protection when he legally provides pilotage services. Conversely, shipping should be protected against possible misrepresentation and any wrongdoing by those who so act as pilots, whether or not they have an official status.

The main features that should be covered in such legislative control are:

(a) *Statutory provisions for the protection of shipping*

- (i) by defining appropriate statutory offences to protect vessels against misrepresentation, wrongful acts or omissions of a pilot, or persons unlawfully or wrongly claiming to possess the required competency to pilot;
- (ii) by providing means to prevent any person from piloting if he is considered a safety risk;
- (iii) by making it a statutory obligation for a pilot to remain on board a ship as long as necessary for the safety of the ship;

(b) *Statutory provisions for the protection of pilots*

- (i) by limiting their civil liability;
- (ii) by providing added protection to the pilotage claim;
- (iii) by providing a short prescription (time limitation) for claims against pilots;
- (iv) by providing means to enforce the pilots' right to be disembarked on completion of their piloting duties.

Statutory offences applicable to all pilots

For the protection of the public and particularly of shipping, the Act should create statutory offences applicable to all pilots, including the following:

- (a) by retaining the indictable offence contained in sec. 369 C.S.A., i.e., for any person acting as a pilot to endanger a ship or the life or limb of any person on board by breach or neglect of duty or by reason of being under the influence of intoxicating liquor or narcotic drugs (vide C. 9, pp. 343 and ff.);
- (b) by providing a lesser offence for any person to be under the influence of intoxicating liquor or narcotic drugs when acting as a pilot, or about to act as pilot, or when offering his services, despite the fact that the safety of a ship or of any person on board was not thereby endangered (vide C. 9, p. 395, and Recommendation 33);
- (c) by retaining the offence described in sec. 371, i.e., endangering a ship "by any misrepresentation of circumstances upon which the safety of a ship depends";

- (d) by making it an offence for a person to make any misrepresentation as to his actual status as a pilot, or the extent and limits of his legal or professional competency, even though such misrepresentation may not have endangered the safety of a vessel;
- (e) by creating an offence for any person to offer his services as pilot or to act as such when under a prohibition to pilot, or when his marine certificate of competency or his pilot's licence, approved document or personal pilotage exemption certificate has been suspended on the ground that he was considered a safety risk as a pilot or as navigator of a vessel;
- (f) by extending to all pilots the offences listed in sec. 368;
- (g) by providing that if a person charged with one of the higher offences listed in (a) or (c) is not found guilty of that offence, he may be found guilty of one of the lesser offences listed in (b) or (d), if proven.

The Act should provide also that a licensed or approved pilot who is found guilty of any of these offences should be subject to reappraisal (vide Recommendation 33); any other type of pilot should be liable on conviction to either a permanent or temporary prohibition to pilot as recommended in the next paragraph.

Extension of jurisdiction of statutory courts listed in Part VIII C.S.A.

It is considered that the jurisdiction of the various courts listed in Part VIII C.S.A. should be enlarged to extend to the conduct of any person who meets the statutory definition of pilot while acting as such. The Court of Formal Investigation and the Court of Inquiry of sec. 579 C.S.A. should be empowered to prohibit any person who is not an officially recognized pilot, i.e., licensed or approved, from acting as pilot if he is found to be a safety risk, under pain of committing an indictable offence.

A pilot to remain on board and provide his services if required in the interest of safety

Present legislation contains no provision to prevent a licensed pilot from ceasing to pilot when his ship has reached a limit of his Pilotage District (sec. 361 C.S.A.), when, by doing so, the safety of the ship may be endangered. Because sec. 361 C.S.A. does not apply to him, an unlicensed pilot may cease to pilot at any time (save his liability for contractual damages if he ceases before reaching the point to which he has undertaken to pilot the ship).

The new Act should provide that a pilot must continue to pilot beyond the point where he would normally be entitled to disembark if safety requires and he is requested to do so by the Master. At changeover points at the

common limit of contiguous Districts, the pilot to be relieved should continue to pilot until the relieving pilot is on board and is ready to take over (vide C. 3, pp. 49-51).

Non-compliance should be a statutory offence involving severe punishment. In addition, the pilot found guilty should be subject to reappraisal or to a prohibition to pilot as recommended above for other proposed statutory offences. The few cases that would arise should be considered normal hazards of the profession which should not call for extra remuneration.

Limitation of pilots' civil liability

It is considered that the principle of the relative limitation of the civil liability of pilots, which was introduced into the Act in 1936, should be retained but that the limit should be substantially raised.

It is normal that every man should be called upon to bear responsibility for his actions and there is no reason why pilots should be an exception to this rule.

Normally, the civil liability of a professional man is an adequate incentive to exercise reasonable care and maintain his qualifications.

However, it must be realized that where pilotage is concerned, an error of judgment or the slightest negligence may, and often does, cause damage far beyond the means of any individual pilot to make good.

It is human to err and no conscientious person can be expected to engage in the exacting profession of pilotage if he must always fear that his slightest error, even after years without blemish, may result in bankruptcy.

There are two ways to deal with the matter, i.e., either placing no limit on civil liability and leaving it to the pilots, either individually or as a group, to take out insurance against such a risk, or placing a reasonable statutory limit on civil liability.

When dealing with a large group of pilots, the first proposal would, at first sight, appear indicated. It would then be the pilots' responsibility to find a reliable insurance company that would undertake the risk. However, if full coverage was to be obtained, the resulting high premiums would then have to be compensated by higher pilotage dues, since they must be considered part of the pilots' operating expenses. In the final analysis, such premiums would be borne by shipping.

Apart from the question of high premiums, the plight of the individual isolated pilot who could not benefit from the division of the risk as a group should be considered. It is quite possible that such a pilot would not be able to obtain full coverage at a reasonable rate and that, therefore, the considerable financial risk involved would discourage him from piloting on the few occasions his services might be required. This system would discourage conscientious, qualified persons from rendering a service from which the

public would benefit and would work particular hardship on non-organized areas which would be deprived of responsible pilotage services that would otherwise be available.

It is considered, therefore, that the solution lies in the second proposal, i.e., fixing a statutory limit on civil liability in an amount commensurate with the financial means of individual pilots. The right attitude was taken in 1936 when the maximum civil liability of pilots was fixed at \$300. However, this limitation, which has remained unchanged ever since, is now clearly too low. As pointed out in Chapter 9, p. 393, an aggrieved party never sues a pilot in damages, obviously because the loss of time, the trouble and expense such civil proceedings entail make them unprofitable. The situation should be remedied by a substantial increase in the liability limit. It is further considered that it would be fairer to the pilots and to claimants for large amounts if all claims, whatever their size, against pilots were subject to the same limit. It is suggested that an appropriate limit would be one-tenth of the damages suffered by any party involved up to an aggregate maximum of \$25,000 for any one casualty.

As is now the case (subsec. 362(2) C.S.A.), the limitation of civil liability should be restricted to damages occasioned by neglect or want of skill and should not apply to cases of gross negligence or wilful wrongful act or omission. In view of the possible differences between provincial laws on the subject, and in order to avoid any ambiguity, it is considered that this should be fully enunciated in the Pilotage Act. Furthermore, the Act should state clearly that such a limitation of liability is a personal privilege extended to a pilot and that it does not affect the liability of any other party who, either with the pilot or an account of the pilot's fault, may be held liable for damages.

In addition, except where the pilots are Crown employees, it should be made a statutory condition to holding a licence or an approved certificate that a pilot's civil liability be covered by a \$25,000 bond of guarantee in order to ensure that civil claims against pilots would not be in vain.

Pilotage claims to be given added protection

If the principle is accepted that all pilots perform a public service, although in varying degrees, this fact should be recognized by giving pilotage claims a preferred rank and by providing a lien against vessels to ensure their enforcement, whether a pilotage claim is payable to a Pilotage Authority or to a pilot himself, or to any organization which provided his services. This should be in addition to the right of any Pilotage Authority to have the clearance of a vessel withheld when dues are owing as per subsec. 344(2) C.S.A. (vide C. 6, pp. 195 and ff.).

The term "pilotage claim" should be defined to include not only pilotage dues but any amount of money that may become owing by a vessel

for pilotage, i.e., indemnities, liquidated damages, penalties and other charges established by legislation, and unliquidated damages that a vessel may be asked to pay a pilot or those who provide his services.

The Act should further provide for the right of a vessel to proceed, despite the non-payment of a pilotage claim when its validity is contested, by providing for the vessel's right to deposit in escrow in the hands of the Court the amount in question plus estimated costs, or a bond to be held by the Court, until the decision is rendered as to the validity of the claim.

Short time limitation for claims against pilots

In order not to leave pilots in a state of uncertainty whether claims in damages would be filed against them (because such uncertainty would be detrimental to their morale and might affect their efficiency), a short prescription should be provided in the Act at the expiration of which any civil claim for damages arising out of acts as pilot, whether contractual or in torts, for which legal proceedings have not been taken, would be time-barred. It is considered that one year would be an adequate period. This delay should be sufficient to allow the completion of official investigations. A shorter delay might have the unwarranted result of unnecessary civil actions being taken against pilots simply as conservatory measures, if the official investigations are not terminated at the expiration of the time limit. At present, this matter is governed by the general legislation of each province regarding torts and contracts, and the time limits vary between provinces. In view of the importance of the question, it is considered that it would be preferable for the Federal Parliament to retain control so that uniform treatment can be given all pilots through appropriate provisions contained in the Pilotage Act.

Right of pilots to be disembarked when services are completed

As a corollary to their obligation to remain on board after the termination of their services, if the safety of the vessel so requires or until relieved when pilots change over, the Act should recognize the right of pilots to be disembarked in the proper disembarkation area when their services are completed, and should provide for the various eventualities that may then occur.

It is one of the contractual obligations on the part of vessels to allow pilots to disembark at the completion of the pilotage service for which they are employed, safety permitting, while, on the other hand, it is the responsibility of the pilots or those who direct the service, to provide for their transportation in the disembarkation area from ship to shore and to arrange for return transportation to their station. The employment of a pilot implies the undertaking on the part of the Master concerned to proceed to regular boarding stations or, in non-organized territory, to whatever place was fixed in the pilotage agreement between the Master and the pilot.

However, a pilot may be overcarried in five situations:

- (a) circumstances beyond the control of either the vessel or the pilot;
- (b) the pilot's fault;
- (c) lack of disembarking facilities;
- (d) a mutual agreement between Master and pilot;
- (e) the vessel's fault.

The provision of sec. 359 C.S.A. regarding the payment of an indemnity to a pilot who, through causes beyond the control of both pilot and ship, is overcarried beyond the official or agreed disembarkation point should be retained and, moreover, it should be clearly indicated that this provision applies to all pilots. The pilot should be returned at the first opportunity to his station at the ship's expense and, in addition, liability should be assumed during the full period of absence for the cost of his board and lodging plus the payment of the statutory indemnity. Such indemnity should not be commensurate with the average value of a day's pilotage because overcarriage in such circumstances is a normal occupational risk that the pilots must accept. Doubtless, it was for that very reason that the amount of this indemnity has always been very low, i.e., from 1873 to 1934, \$2 per day; in 1934, raised to \$3; and, finally, in 1952, set at \$15. It is recommended that under present circumstances this indemnity should be raised to \$25 per day (vide C. 6, pp. 201 and ff.). The day should not be the calendar day but a period of 24 hours beginning when the overcarriage commences and a fraction of a day should count as one day.

When overcarriage is the pilot's fault, a vessel should not be called upon to bear any of the resultant extra expenses. The vessel's obligation should not extend beyond disembarking the pilot at the first opportunity without being required either to detour from the normal route or to incur any undue delay.

When there is no alternative except to over carry the pilot because no disembarking facilities exist on the intended route, a vessel should not be obliged to pay anything in excess of the pilotage dues for the services rendered. This applies *a fortiori* when a vessel is compelled to employ a pilot. Arrangements for disembarking are the pilot's own responsibility or those of the organization providing his services. When, for reasons of internal organization, it is decided not to maintain disembarkation facilities in areas where only occasional requirements are expected, the vessels affected by such an administrative decision should not be required to bear any extra cost as a result. Pilots should then be disembarked at the first opportunity and any expenses incurred for their return to station should be borne by the District as a normal operating expense, just as the cost of operating the disembarkation facilities would have been borne had they been established. Expenses of this kind should be shared by all users through pilotage rates and should not

be charged discriminately to the few vessels adversely affected. In non-organized areas the question should be settled by agreement between Masters and pilots as part of the pilotage contract.

At times, vessels may be prevented from taking shorter alternative routes because they are required to embark or disembark a pilot. The Act should authorize that, in such circumstances, if the exigencies of the pilotage service permits, vessels may be accommodated by allowing pilots to board or disembark outside the District. The Pilotage Authorities of the Districts where this situation may arise should be authorized to provide in their regulations as part of the tariff the amount to be paid as pilotage dues for the time spent by a pilot outside the District for the benefit of a vessel, in addition to the pilotage dues for services rendered, the transportation costs from or to the nearest boarding station and other travelling expenses. In such a case, the daily indemnity to be fixed in the tariff should represent the average amount a District pilot would earn in a day, or such other amount as the Pilotage Authority may deem advisable to fix as the value of the extra service.

In cases where a vessel could reasonably have disembarked a pilot without danger at the disembarkation point, but failed to do so for its own convenience and against the wishes of the pilot, the vessel should be liable to pay the pilot, or those providing his services, either the full amount of the contractual damages occasioned thereby or a severe penalty fixed by statute such as double the statutory indemnity for overcarriage, plus other expenses, whichever the pilot, or those providing his services, choose to claim. In these circumstances, overcarriage is a breach of contract for which the vessel should bear full responsibility.

RECOMMENDATION No. 12

Licensing to be the essential component of any form of public administrative control over pilotage

Whenever there is any degree of Crown involvement in pilotage, whether total, i.e., the service is provided by Crown employees, or limited to authorizing persons to act as pilots, the Crown's intervention implicitly guarantees to the public and the shipowners that officially recognized pilots or holders of a personal pilotage exemption certificate (vide Recommendation 23) possess the required qualifications to navigate in the confined waters for which the licences or certificates are valid.

This guarantee imposes on the Crown the responsibility of ensuring that licensees and certificate-holders are duly qualified. Since this question is essentially one of fact, its solution can neither be a discretionary, administrative decision, nor be determined by the uncertainties of negotiation between

the parties immediately concerned. A person's competence exists *per se*, and can not be created by anyone else's decision or agreement. The only recourse is to ascertain the extent of the qualifications a person possesses in order to find out whether he meets the minimum standard required. This reappraisal presupposes, first, the establishment of the minimum required standards in legislation and, secondly, a licensing process. Licensing means the quasi-judicial appraisal of a person's qualifications (vide C. 8, p. 300). In pilotage, because a person must not only be qualified when licensed but also must remain qualified, licensing entails duties of surveillance and reappraisal (vide C. 9).

As pointed out in Chapter 8 (pp. 301 and ff.), licensing is the only adequate means of protecting the superior interest of the public, whatever the status of a pilot may be. Therefore, in organized territories, i.e., within Pilotage Districts and ports and areas attached to them for licensing purposes (vide Recommendation 8), a licence should be the prerequisite for anyone to pilot, whether he has the status of an independent contractor, a quasi-employee, or an employee either of the Crown, or a pilots' organization, or a private concern. If a pilot is an employee, the permanent withdrawal of his licence would automatically terminate his employment as pilot, whether or not the situation is covered in the terms and conditions of the contract of employment and any agreement to the contrary would be *ipso facto* invalid as contrary to the public interest. The licensing process is *a fortiori* the only method for granting a pilotage exemption certificate in view of the absence of any contractual relationship between the Master or mate of a vessel and the Pilotage Authority.

In addition, the Act should contain provisions authorizing a Pilotage Authority to license persons to act merely as pilotage advisers to Masters on local matters pertaining to navigation in areas where:

- (a) local conditions are sufficiently safe that Masters can proceed safely without a pilot with the aid of information and guidance; or
- (b) there are no qualified mariners available to be licensed as pilots.

In these circumstances, for the greater protection of shipping, if the conditions are deemed not to be such as to require that vessels must be navigated by pilots, the Pilotage Authority should be allowed to grant adviser's licences to persons whose thorough knowledge of the navigational hazards and prevailing conditions in given confined waters, has been ascertained. Once their local knowledge has been proved satisfactory, they should be issued an official acknowledgment, which might be termed "Pilotage Adviser's Licence". Such a licence would carry, *mutatis mutandis*, the same rights, privileges and obligations as a pilot's licence.

This situation prevails in the Prince Edward Island District and in some local Commission Districts on the East Coast where persons holding a suitable certificate of competency are not available locally but mariners with adequate local knowledge, i.e., fishermen and other persons actively navigating small craft in the area, can be and are employed. Thus, it is a service to shipping to place the local knowledge of these persons at the disposal of Masters.

However, if such limited assistance is not deemed sufficient to ensure a vessel's safety, power to issue an adviser's licence should not be granted. Whether or not a given Pilotage Authority should be granted such power and, if granted, whether it should be limited to certain classes of vessels or be confined to only part of a District, should be the responsibility of the superior authority charged with the creation of Pilotage Districts, i.e., the Central Authority (vide Recommendation 17). In an area where pilotage is required in the public interest but such power is denied, and no qualified pilot candidates are available, the only solution is for the service to be provided by pilots employed by the Crown.

A Pilotage Authority with power to license pilotage advisers for certain given waters should automatically have power to grant pilots' licences for the same waters if qualified candidates become available. Pilots' licences and pilotage advisers' licences could exist concurrently. The main governing factors to decide whether to license advisers in addition to pilots are:

- (a) the relative advantages to be derived from the services of pilots in view of the higher rates their services warrant;
- (b) whether or not the available pilots can meet the demand for their services.

Under present legislation, the authority possessing licensing power is called "Pilotage Authority". All the other powers and functions it possesses are second in importance to licensing. As previously explained (vide C. 8, pp. 237-242), the present statutory definition of the term "Pilotage Authority" is not *ad rem* and may be an unnecessary source of confusion; it is considered that it should be replaced by a new statutory definition identifying the term with the licensing function, thereby clearly indicating that any other person or authority possessing and exercising any other pilotage function or power in the pilotage organization, such as directing the service, can not be "Pilotage Authority" on that account. Normally, all these accessory functions should also be exercised by the Pilotage Authority, but the fact that any of them may have been made the responsibility of another person or authority does not make that person or authority "Pilotage Authority".

RECOMMENDATION NO. 13

**The Act to define the basic minimum qualifications required
for licensed pilots and approved pilots**

The only requirements of this nature in the present Canada Shipping Act are found in sec. 338 which fixes the ultimate age limit at seventy, and sec. 336 which provides that once a pilot is licensed his pilotage activities should not be interrupted over a consecutive period of two years. The formulation of the remaining qualifications is left (with limitations, vide Recommendations 31, 32 and 33) to each Pilotage Authority, presumably to ensure that the qualifications standards meet local requirements.

Because the definition of qualifications required of pilots has been left to be determined entirely by the various Pilotage Authorities through their regulations, and since the Act does not establish any minimum standards, the result is that, in certain Districts, some essential basic qualifications, such as competency to navigate a vessel, are not even required (vide C. 8, pp. 251-253). The seriousness of the situation is compounded when, through a compulsory system, vessels are forced, or at least induced, to employ a pilot imposed upon them by chance through a tour de rôle system. This is tantamount to misrepresentation on the part of the Pilotage Authorities concerned because the very least a Master has the right to expect is that any person who is represented by a Pilotage Authority as being a pilot should meet the basic requirement implied in the statutory definition of the term "pilot", i.e., a person competent to take charge of the navigation of his vessel. Licensing a pilot is an implied guarantee by the Crown to a Master that the licence-holder is both qualified to navigate the Master's vessel (re meaning of the term "pilot", vide C. 2, pp. 22 and ff.) and is also an expert in the navigation of the waters for which his licence is valid.

Because the question of general competence to navigate and handle vessels is common to all navigators and is not determined by local conditions in a District, it should not be left to individual Pilotage Authorities to decide what standards of qualifications are required but rather this should be made the responsibility of a single authority for them all. Such authority already exists and there is no reason why the appraisal of a pilot's general, basic competency as a mariner should be made by any other authority.

To become a pilot a person must be, in fact, a competent navigator, which implies that he not only possesses the required technical knowledge but that he has also had adequate and successful experience as such. The minimum certificates of competency candidates for pilot should hold are those which indicate that they have had both the necessary theoretical training and practical experience.

Therefore, it is considered that the Act should prescribe as a minimum prerequisite to be considered as a prospective licensed pilot or approved pilot, possession of an unrestricted certificate of competency not lower than

Master Home Trade or Master Inland Waters issued by the Department of Transport pursuant to Part II of the Canada Shipping Act. These certificates ensure that the holder has had satisfactory practical experience of navigation when on duty as officer of the watch on the bridge.

Following this system, the Department of Transport and the Pilotage Authority are each left with the responsibility that pertains to their respective jurisdiction and function, the Pilotage Authority being empowered by the Act to add to this minimum requirement whatever further qualification it considers warranted to meet the needs of the service in its District. On the other hand, the recommendation recognizes and respects the jurisdiction and responsibility of the Minister of Transport re the competency of mariners. This system will also make it possible to limit the activities of each of these authorities to its own field of jurisdiction (vide Recommendation 36).

The Act should also list all the other basic minimum qualifications that must be obtained, whether in the field of professional qualifications, physical or mental fitness or reliability (vide Recommendations 31, 32 and 33).

RECOMMENDATION No. 14

The direction and management of the service at local level to be performed by the Pilotage Authority in Districts where pilotage is a public service

In Districts where the pilots do not enjoy the free exercise of their professional activities and can not perform assignments except as directed by a controlling authority, pilotage is termed *controlled*. Pilots are employees if the Authority's right or power to control is derived wholly or partly from a contract of engagement; pilots are *de facto* employees (also referred to as quasi-employees in this Report) when this power to control is derived entirely from legislation. In the latter case, control may be partial or complete depending upon whether, in addition to being obliged to accept despatching, the pilots are remunerated through a pooling system and the Authority operates or controls auxiliary services, such as pilot vessels and pilot stations.

Controlled pilotage is a factual situation that must be taken into account in any realistic pilotage legislation. It is a fact that can not be ignored that, despite its inadmissibility under existing legislation and despite the loss of freedom it implies for both pilots and shipping, controlled pilotage has completely superseded the free enterprise system in Canada (vide C. 4, pp. 74 and ff. and Comments on p. 95). The fundamental reason for this change is that control of the provision of pilotage services has proved to be a prerequisite if an adequate, efficient, reliable pilotage service is to be maintained. The necessary degree of control increases with the size of the District organization and the requirements of public interest.

Free enterprise can not exist without competition which is the incentive that forces a person to maintain and improve his qualifications in order to attract clients and to work harder in order to increase his income.

At present, competition has disappeared in pilotage and private initiative no longer exists. Pilots have abandoned the calculated risk inherent in the free exercise of their profession, with the accompanying advantages and disadvantages, in favour of increased security guaranteed by their controlled numbers as well as improved working conditions and a reasonably assured income. Since natural incentives disappeared along with free enterprise, measures of control, to the degree required by public interest, must be imposed to ensure the adequacy of the service.

Free enterprise had many disadvantages for the pilots and shipping. In particular, it failed to guarantee the efficient, reliable service the interests of the nation demand.

Controlled pilotage has gradually replaced the free exercise of the pilot's profession ever since the Quebec pilots gained it in 1860 and the last remnant of free enterprise disappeared in 1960 and 1961 with the abolition of the choice pilot system. Controlled pilotage has now become a fact and the only questions that remain are to decide by whom such control should be effected and what form it should take.

At present, control in all Districts is exercised exclusively by Pilotage Authorities. This has been the rule ever since free enterprise was abandoned, with the two exceptions of the early pilotage organizations in the Districts of Quebec and Montreal. At that time, controlled pilotage became a requirement through the exigencies of the service but the Pilotage Authorities concerned were not ready to accept the added responsibilities this system implied and, hence, the pilots had to assume them. The Montreal pilots lost control when their despatcher became the employee of the Pilotage Authority and the Quebec pilots when, for financial reasons, they voluntarily surrendered their powers to the Minister of Marine and Fisheries in 1905, and lost them altogether with the 1914 Act which officially put the Minister in full control. Ever since, in all the most important Districts, the provision of services has been directed by each District Pilotage Authority. This system has worked well. The Commission received no criticism whatsoever of the arrangements made by the various Pilotage Authorities for the provision of pilotage services, and the record shows that this task has been discharged most satisfactorily. It is considered that nothing should be done to disturb what has worked well, unless there are very serious grounds for such action. The Commission can not find any reason to warrant a change.

In their plan for the organization of pilotage in Canada, the Federation of the St. Lawrence Pilots proposes complete local control of operations by the pilots themselves grouped in a corporation under the legislative control and administrative surveillance of the State. They quote as examples the pilotage organizations in France, Italy and West Germany in particular

where, at the District level, the service is, in various degrees, controlled and managed by the pilots themselves. These examples should be accepted with great caution because, in fact, a great deal of control is exercised by the State in each of these countries and, furthermore, because the situations are not comparable. The governing factors are mainly, first, finance, in that each station must be financially self-supporting and, second, a long standing existing factual situation that had to be taken into consideration when the legislation was drafted. In the countries referred to, the trend is toward increased State control. The Federation also made reference to the United States but there are very few valid points of comparison. Pilotage is dealt with on an *ad hoc* basis through legislation by 20 States and one federal act for the Great Lakes Basin. (For more details, reference is made to the study of the legislation of these countries appearing in Appendix XIII.) The situation in Canada can not be compared to the situation in any of these four countries, first, because of the vital importance of pilotage to the national economy, particularly in certain areas where the provision of first class services is required, whether or not they are financially self-supporting and, second, because of the different factual situation, i.e., control is at present exercised satisfactorily by the State through the Pilotage Authorities. It is considered that it would be a retrograde step to replace a satisfactory existing system by one whose efficiency still has to be proven in Canada where the maintenance of an adequate service is a public requirement.

The next question is the extent of such State control, i.e., whether it should be limited to despatching, with or without pooling of pilotage money, or whether wider control should be exercised by an authority who provides services with pilots who are its employees.

Neither in theory nor in practice is there any incompatibility if a Pilotage Authority, in addition to its licensing function, is made responsible for the provision and direction of the pilots' services. Moreover, there would be no incompatibility if the latter function were exercised by a third party, i.e., either another Crown entity, or an independent private organization or even the pilots themselves as a group.

It is considered that the Crown must exercise full control in the following two circumstances:

- (a) where pilotage is considered an essential public service;
- (b) where no pilotage service exists but, in the interest of the public, one must be provided.

It is considered that, in the first case, the Pilotage Authority must direct the service while, in the latter, the direction of the service may be exercised by a Department or another Crown entity, but such control should cease when there is an adequate alternative. However, to avoid duplication of Crown organizations, such control should be exercised by the Pilotage Authority.

In Districts where the pilotage service is considered an essential public service, i.e., where the existence of the service and its adequacy and efficiency are matters of national concern, it is considered that the service should be fully controlled by the State. A vital national interest should not be a responsibility of third parties over whom the Crown has no control and who are primarily motivated by their own private interests and, even less, of those who provide services, i.e., the pilots themselves (because of the basic conflict of interests this would create). No one should be placed in the position of having to choose between his immediate private interest and the general good of the public. Human nature being what it is, there is reason to believe that the public would suffer. The record shows many instances of such conflicts in all the important Districts. It would appear that the main cause for the withdrawal of the controlled powers the 1860 Quebec Pilots Corporation enjoyed was the abuses that prevailed. (Vide Part IV—Quebec District.) There is also the additional reason that these private parties are not responsible to Parliament.

Accordingly, it is considered that whenever a pilotage service is classified as an essential public service, its control should be entrusted to the Pilotage Authority whose *raison d'être* is the safeguarding of the interests of the State and of the Public. When a service has to be organized and provided by the Crown, it is considered that this responsibility should be entrusted to the Pilotage Authority.

Where a pilotage service is classified as a private service, i.e., principally maintained for the convenience of shipping, there would be no objection if such control were entrusted to a private organization or to a pilots' organization. This is a matter, however, that should be left to be determined by the Central Authority, taking into consideration the circumstances attending each case. Granting such control would, in effect, mean granting a franchise to the organization concerned, which would then incur the responsibility of providing pilots who met the licensing requirements of the Pilotage Authority and in sufficient numbers to meet the demand. If this solution failed, the franchise should be withdrawn and the exercise of the profession left open, under the normal licensing control of the Pilotage Authority.

Wherever the service must be maintained in the public interest but is not classified as essential (but merely a public service) because even a prolonged disruption would not seriously affect the national economy, State control at the operational level is less necessary. Whether this control should be imposed is a question to be decided by the Central Authority, taking into consideration the situation in each case.

The authority for such control, whether it is exercised by the Pilotage Authority itself, or by a private organization, or by the pilots, must be based on appropriate legislative provisions and, therefore, should be clearly established in the new Act. (Vide C. 8, pp. 301 and ff.)

State control does not mean that the pilots should not be interested in the service. In fact, under the State control that now exists in all Districts, the pilots have been actively involved in the decision-making processes regarding policy, management of their District and the provision of services. It is a matter of record that the most progressive pilotage reforms, especially in the St. Lawrence River Districts, have been the result of the pilots' initiative and studies. Since they are the experts in pilotage, they must be consulted and their assistance is necessary, but in view of the possible conflict of interests, responsibility for final decisions must rest with the State.

Whenever the pilots are not free to exercise their profession (except when they are employees and paid a salary), a pool should be established through the District pilotage regulations; earnings should be pooled by the despatching authority and each pilot should be remunerated by a share in the pool. The pooling system should be based on time available for duty with provision for time off, rest periods, leave of absence, and sick leave; equal licenses should command equal remuneration, graded licences should call for graded shares.

As may be seen in the study of the pilotage legislation in other countries (App. XIII), the prevailing system is controlled pilotage with pilots being assigned to duty by a tour de rôle. Despatching is always accompanied by compulsory pooling and some legislation (e.g., France) makes special mention of it. (For further details, vide C. 6, pp. 186 and ff., the recommended rules, p. 194, and C. 4, pp. 84 and ff.)

RECOMMENDATION No. 15

The principle of decentralization to be retained and fully implemented

The 1873 Pilotage Act established a two-stage administrative control which has never been changed in principle:

- (a) a Central Authority responsible for establishing local administrative control units, possessing limited control powers and financed from public funds (this function has always been exercised by the Governor in Council);
- (b) autonomous, financially self-supporting control units, i.e., Pilotage Districts under the direction of their respective Pilotage Authorities (vide C. 3 and C. 5).

The limited control powers of the Central Authority were consonant with the principle that the Crown should not become involved in a service which was mainly conceived as a private service to shipping. The principle

that administration and regulation-making should be decentralized was realistic and fully justifiable owing to the very nature of pilotage, particularly in Canada where there is a great diversity of types of pilotage operations and services.

Despite the fact that this legal structure has remained unchanged, the administration of all the main Districts has been centralized in Ottawa in the hands of the Department of Transport. This centralization was effected by the device of replacing a number of Pilotage Authorities composed of local commissions or corporations, by the Minister as the Pilotage Authority for each of these Districts. This step, which was taken in the most important Districts, gave the Department of Transport effective control over both general direction and local administration of pilotage throughout Canada. It is important to note that the nine Pilotage Districts where the Minister is the Pilotage Authority account for 93.8 per cent of the total cost of pilotage in Canada (vide C. 5, p. 126). Parliament intended neither the Government nor any of its departments to play this rôle when pilotage legislation was first introduced in 1873 (vide C. 3, pp. 57 to 59, and C. 9, p. 430).

This centralization developed not because it was in any way a service requirement, but as the unexpected and unwarranted result of overly restrictive legislation based on an unrealistic concept of the pilotage service and its requirements. In 1873, pilotage in certain Districts was an essential public service and, as Canada grew and shipping developed, it became a public necessity in other Districts as well, thus requiring large scale Crown involvement, although this was not permissible under existing legislation. The correct procedure would have been to draft new legislation which empowered the Central Authority to draw up general policies and co-ordinate the activities of the various Districts and, at the same time, provided sufficient funds to support pilotage in areas that could not be self-sufficient. Instead, a Federal Minister was appointed to hold the separate and independent office of Pilotage Authority in a number of Districts.

This appointment actually created a third level in the administration of pilotage since the Superintendent (or Supervisor) at District level became merely a manager acting under orders from Ottawa.

The exception has now become the rule with the result that both local policy and local administration are centralized in the Department of Transport in Ottawa. The Districts concerned are administered and directed from there by officials who can not be expected to be acquainted with the detailed administrative problems and changing needs of each individual District (vide C. 9, p. 429). Although only general principles and basic organization are applicable across Canada, centralization resulted in efforts to standardize local services which are essentially dissimilar.

The remoteness of the Pilotage Authority has proved frustrating because long delays result and inadequate decisions are rendered for lack of

detailed knowledge of local situations. In addition, the overburdened Department of Transport officials lack the time to give more than superficial attention to pilotage and can attend to day-to-day problems only, with insufficient opportunity to carry out studies in depth.

Another result is the detrimental confusion that prevails regarding the functions of the Minister of Transport, as such, and the Minister as Pilotage Authority for the largest Districts, and the misuse of the powers pertaining to each function (vide C. 9). There is also a conflict because the authority responsible for pilotage administration is also the authority charged by the Act with the duty of pilotage surveillance. The consequence is that no surveillance is carried out (vide C. 3, pp. 62 and 63).

The situation might have been somewhat improved if the activities of the Ottawa Headquarters had been limited to establishing policy and making regulations, leaving the implementation of policy and District administration to local delegates. A laudable effort was made in this direction when subsec. 327(2) of the Act was amended in 1933 to authorize the Minister to delegate any of his powers as Pilotage Authority (vide C. 8, p. 290). However, in practice, this legislative provision remained unused.

If a service is regarded as essential in the interest of the State, it should be organized to ensure maximum efficiency and, within reasonable limits, financial considerations should not be allowed to interfere.

It is considered that this aim could be achieved in pilotage only by decentralizing under appropriate controls to the greatest possible extent, i.e., decentralization of regulation-making powers, District administration and local operations.

The quality, efficiency and reliability of pilotage is in direct relation to the competence, and constant availability of an Authority which is fully conversant with the local situation.

Indeed, centralized control in the Department of Transport in Ottawa has demonstrated that the original concept of decentralization is realistic and experience has proved that the best judges of pilotage requirements in a District are the officials in charge of local operations.

Therefore, it is considered that the principle of a two-level organization should be retained with, however, increased powers for the Central Authority, i.e.,

- (a) by appointing an independent Central Authority with power not only to create Districts but also to formulate general policies giving effective control to ensure that (i) each Pilotage District is provided with the system it requires, (ii) each Pilotage Authority discharges its responsibilities, and (iii) each District where pilotage is a public necessity receives the financial assistance needed to maintain an adequate service;

- (b) by retaining the concept of Pilotage Authorities recruited locally to administer Pilotage Districts;
- (c) by establishing at each level a proper system of surveillance and control, together with appropriate means of appeal to prevent misuse or abuse of authority.

RECOMMENDATION NO. 16

The Central Pilotage Authority to be a Crown agency corporation responsible to Parliament through a designated Minister

Under the limited scheme of administrative control provided by Part VI, C.S.A., the Central Authority has few powers. These powers involve creating Pilotage Districts, fixing their limits, appointing their Pilotage Authorities and deciding whether or not the payment of dues will be compulsory. The power to create Districts is restricted by the implied criteria that pilotage is only a private service to shipping which must be financially self-supporting (vide C. 3 p. 46 and C. 5). The Central Authority also has limited powers of control over the activities of Pilotage Authorities through the replacement of Board members whose office is held during pleasure, and through the requirement that Pilotage Authorities' regulations and expenditures must receive its approval.

Even if these limited powers were fully exercised, they would no longer be adequate for the present requirement of pilotage which, for the most part, has developed into a service of national importance in which the Government has become increasingly involved.

To date, the function of the Central Authority has always been exercised by the Governor in Council but there would be no legal objection if these powers were exercised by another authority. Moreover, from a practical point of view, the Governor in Council should not be overwhelmed with responsibilities which could be effectively discharged by others. The authority exercised by the Governor in Council has been, and is still, merely perfunctory, as is apparent from the number of ultra vires regulations which have been confirmed, thereby defeating the very purpose of this legislation requirement. A further complication is caused by the developing practice of not seeking the Governor in Council's approval for expenditures (contrary to the imperative provision of sec. 328 C.S.A.). The Governor in Council lacks the opportunity to devote to the organization and administration of pilotage the time and attention these duties now require.

Pilotage is a necessary public service in many Districts and is becoming increasingly so in other areas. The constant, active and exclusive attention of an independent Central Authority is required to meet this situation. If this Central Authority is to discharge its responsibilities effectively, in addition to

being granted the necessary powers (vide Recommendation 17), it must be guaranteed by statute freedom of action, a prerequisite of the exercise of true power, not precluding the existence of adequate controls to prevent arbitrary excesses and to ensure the performance of obligations.

It is considered that this aim can best be achieved by:

- (a) entrusting the function of the Central Authority to a Crown agency in the form of a Board;
- (b) granting this Board corporate status with all the powers such status normally involves (vide C. 8, pp. 239 and ff., pp. 315 and ff.);
- (c) making this Board accountable to Parliament through a Minister designated by the Governor in Council;
- (d) ensuring the independence of the Board's members through appointments for fixed terms and not during pleasure;
- (e) assuring its financial independence by providing that all expenditures for its administration and operation are to be paid by Parliamentary appropriations.

It is considered that the function of the Central Authority should be entrusted to a Board and not to a single appointee because the rôle the Central Authority must play in the proposed new pilotage legislation will be so involved and demanding that it can best be discharged by a Board. A Board has the advantage of affording the opportunity of obtaining a consensus of opinion and thereby guarding against individual errors of judgment. It also has the advantage of being impersonal, which is an additional guarantee of impartiality and lessens the possibility that undue influence and pressure might be brought to bear against an individual. A Board has the further advantage of ensuring the necessary continuity.

It is suggested that an appropriate name for the Central Authority would be the "National Pilotage Board".

It is considered that such a Board should be given corporate status because of the practical advantages to be derived, *inter alia*:

- (a) it clearly identifies the Board as a Crown agency with a legal identity rather than a group of people;
- (b) it facilitates operations in that a corporation can own assets, enter into contracts, sue and be sued in its own name;
- (c) a corporation's existence continues regardless of its individual members.

The status of an independent, autonomous Crown entity also has, *inter alia*, the marked advantage of warding off undue partisan political influence in pilotage. It is a matter of record that such influences have played a major rôle in the past and are still a factor when members of Pilotage Authorities

are being appointed (vide C. 3, pp. 56 and 57). These activities are unacceptable in the administration of a service on which the safety of navigation depends. Such political activities have been reduced considerably since the appointment of the Minister of Transport in lieu of a Board as Pilotage Authority for all the larger Districts, but the ensuing diversion of the local Pilotage Authority's responsibility into the hands of a branch of the Government has resulted in a type of political pressure of another sort aimed at influencing general policies and administration.

The Act should specify the status of the Central Authority as that of a Crown agency thereby, *inter alia*, clarifying the status of its employees and the question of the Crown's liability for the acts and contracts of the Central Authority and its officers and employees.

To ensure its necessary independence, the Central Authority should be made accountable only to Parliament. This does not mean that it should not be subject to the normal judicial control of the Courts nor that all its decisions and orders should be final and without appeal, but rather that no other authority than Parliament (through appropriate amendments to the Pilotage Act) could interfere, either directly or indirectly, with the Central Authority's free exercise of its powers.

In addition to the various reports the Central Authority may be required to table before Parliament, a formal mechanism of control should be established by giving the designated Minister the right to request at any time from the Central Authority any information or report on the activities of the Authority itself or any of the Pilotage Authorities. If an unsatisfactory situation is discovered and not remedied, the matter should be reported to Parliament.

To ensure added independence, the Central Authority should not depend on revenues derived from pilotage operations to finance its operations and administration but should be financed from public funds by appropriations. Such an expenditure of public money is warranted by the public service character of the rôle the Central Authority will be called upon to play. Any pilotage revenue received by the Central Authority, whether pilotage dues or Crown subsidies (vide Recommendation 21), will be held only as a trust fund to be administered and employed for the direct benefit of the various pilotage services but never to pay the Authority's expenses. On this account, there is no change from the present situation, except that the operating costs of the Central Authority will be considerably increased because of its increased activities. This system is followed in practically all the principal maritime countries (vide Appendix XIII).

It is considered that, to begin with, the corporation should consist of three members appointed by the Governor in Council to hold office for a fixed period subject to good behaviour; later this number could be increased if deemed necessary. Their appointment should not be during pleasure

because the resultant insecurity of office would be prejudicial to the independence and freedom of action the members should enjoy. The term of office should be long enough (not less than ten years except for the first appointments) to permit the members to gain the knowledge and experience the discharge of their numerous responsibilities will require. In order to assure continuity and a high degree of competence at all times, it is considered that the tenure of office of the members should be staggered so that when a new appointee arrives there are always two fully experienced members on the Board. Furthermore, members should be eligible for reappointment, thereby retaining their acquired experience and knowledge for the benefit of the service. Their remuneration should be in the form of a fixed salary set by the Governor in Council and guaranteed not to be lowered during a term of office.

It is considered that, if the Central Authority is limited to three members, their employment should be on a full-time basis in order to discharge their numerous duties efficiently.

It is also considered that it would not be desirable for the members to be in any way identified with any parties interested in pilotage, i.e., they should represent neither shipping nor the pilots. Any person with interests incompatible with the discharge of the responsibilities of the Central Authority should be ineligible as a member and a prerequisite for appointment should be an unbiased, disinterested approach to the duties of the Authority. The possession of special technical qualifications should not be made an inflexible prerequisite because the Authority should be at liberty to seek expert opinions, as is the normal procedure followed by Courts whenever an important technical question arises. To specify in the Act definite qualifications members must possess would be an unwarranted limitation imposed on the Government in the selection of those best suited to perform the functions of the Authority.

In this regard, the Government should be guided by the requirements imposed by the duties the Central Board will have to fulfil: the possession of special technical qualifications in the field of shipping, pilotage, law, economics and administration should be among the various qualifications to be considered in the selection. The Federation of the Saint Lawrence Pilots has recommended that the post of Central Authority be filled by a bilingual person so that any pilot and any other interested party, whether English or French speaking, will be able to communicate with the Central Authority in the language in which he is more fluent. Although the Commission recommends a Board instead of a one-man authority, the Federation's proposal retains its merits because a great deal of the Central Authority's time will be spent in public hearings in the various Districts and the witnesses and experts appearing before it should be free to express themselves in either language. It is most desirable that the far from adequate process of translation be avoided.

In addition, it is not considered advisable to impose on the Central Authority an Advisory Committee composed of representatives of the parties directly interested, i.e., pilots, shipowners and Pilotage Authorities, because it is felt that more disadvantages than advantages would occur. First, the Advisory Committee would unduly hamper the activities of the Central Authority which should be free to consult whom it wishes whenever required. It does not seem advisable to insist on mandatory consultation with persons whose main qualification is their involvement with the subjects under discussion. Second, experience with Advisory Committees (vide Part IV of the Report, Quebec District) has shown that they are more likely to cause dissatisfaction because the Committee expects its opinion to become the decision. It is agreed that all interested parties should be given the opportunity to be heard before any important decision becomes final, but it is not believed that an Advisory Committee is the appropriate vehicle. A proposed procedure is contained in Recommendations 19 and 20.

RECOMMENDATION No. 17

The powers of the Central Authority to be enlarged to meet the new aims of proposed pilotage legislation

The function of the Central Authority is to implement the Pilotage Act. This involves ascertaining what pilotage services are necessary throughout Canada, establishing services required in the public interest, organizing administrative controls, general surveillance of pilotage administration and operations, and enunciation of general policies.

In addition to having power to appoint its own staff, employ consultants, make by-laws covering both its internal operations and the procedure for conducting the affairs of the corporation, the Central Authority should have the following powers:

(a) Original powers to make regulations (hereafter referred to as "Pilotage Orders"):

1. to create Pilotage Districts when one of the following conditions is met and to abrogate them when the condition no longer exists:
 - (i) whenever it is considered that the establishment of a pilotage service, or administrative control over an existing pilotage service, in a given area is necessary in the public interest; or
 - (ii) whenever it is considered that the establishment of a District is advisable, with three provisos: an adequate service already exists; the organization is expected to be financially self-supporting; a request is made by shipping or other interested parties;

2. to divide or merge Districts to improve efficiency or facilitate administration (vide Recommendation 8);
3. to fix and alter the limits of any District (vide Recommendations 8 and 9); *inter alia*, to establish the changeover zone in contiguous Districts (vide Recommendation 9);
4. to determine the form the Pilotage Authority should take in each District, i.e., whether it should be an *ad hoc* Board, a one-man authority, or an existing public corporation (vide Recommendation 18) and, unless the last named is selected, to appoint the member(s) and fix the remuneration;
5. to classify the pilotage service in each District, or part thereof, according to its relative importance to the national interest;
6. to authorize a Pilotage Authority to license pilotage advisers (vide Recommendation 12) when circumstances warrant;
7. to impose compulsory pilotage, with or without restrictions, on a service, or part of a service, classified as a public service (compulsory pilotage is automatic when a service is classified as an essential public service) (vide Recommendation 21);
8. to define "dangerous cargoes" for the purposes of compulsory pilotage;
9. to define the extent of administrative control to be exercised in each District, and if some control (apart from the licensing function) is to be exercised by an organization other than the Pilotage Authority, to appoint such organization and define its powers (vide Recommendation 13); *inter alia*, whether the Pilotage Authority or such other organization is authorized to provide pilotage services, or operate the pilot vessel service or any other auxiliary service;
10. to determine the status of pilots for each District or part thereof (vide Recommendation 24);
11. to grant a pilots' statutory corporation any of the special powers provided in the Act, if and when required, and to withdraw any of them when deemed advisable in the superior interest of the State and of the service (vide Recommendation 25);
12. to extend administrative control in unorganized areas over the qualifications of pilots, either by attaching ports or areas to an adjacent District, or by charging an existing Pilotage Authority with the responsibility of appraising within an area defined in a Pilotage Order the qualifications of pilots who so request, and with the ensuing accessory responsibilities this appraisal entails (vide Recommendation 10);

13. to establish rules regarding conduct of public hearings under its jurisdiction;
 14. to establish general rules governing the reports required from all Pilotage Authorities and to issue any standing orders considered necessary for the discharge of the Central Authority's general surveillance responsibilities;
 15. to establish the accounting procedure, i.e., financial regulations, to be followed by Pilotage Authorities regarding the handling of pilotage money and grants (vide Recommendation 20);
 16. to fix the form of the contributions from the users to the Central Equalization Trust Fund, and to make rules for the administration of the fund and the requirements for Districts to benefit from it (vide Recommendation 21).
- (b) Supplementary or suppletory power to make District regulations, either when regulations made by Pilotage Authorities are submitted for approval, or when the Pilotage Authority concerned fails to make a necessary regulation (vide Recommendation 19).
- (c) The following administrative powers:
1. when the Pilotage Authority is defined by Pilotage Order as an *ad hoc* Board or a one-man authority, to recommend to the Governor in Council demotion in case of misconduct, gross incompetence or physical or mental inability (vide Recommendation 18);
 2. to carry out studies and research as deemed necessary for the formulation of policies or the discharge of responsibilities;
 3. to act as approving authority of District regulations (vide Recommendation 19), and as Appeal Board on questions of approval of Pilot Corporation By-laws (vide Recommendation 25);
 4. to approve, with or without modification, the budget of Pilotage Authorities and, from time to time, to authorize expenditures not covered in the budget (vide Recommendation 21);
 5. to administer the Central Equalization Trust Fund (vide Recommendation 21);
 6. to exercise, either directly or through delegation, full powers to hold judicial inquiries, as required, in the discharge of its general surveillance responsibility;
 7. to cause a Pilotage Authority or any other organization to which any control power has been granted, to be temporarily

suspended and the District to be administered by a temporary Pilotage Authority, or the control power to be exercised by someone appointed for that purpose, pending the result of the investigation of suspected irregularities by seeking authorization, when required, from the Governor in Council.

There is no objection if other responsibilities and functions are attributed to the Central Authority by appropriate legislation, provided this neither alters the Authority's basic character nor infringes on the principle of decentralization of local administration.

It is considered that the pilotage service in each District (or in each part of a District when the service is divided within the District) should be classified according to the degree of importance to the national interest, thereby determining the maximum permissible degree of control that can be imposed both on pilots and on shipping. The main classifications should be:

- (a) an essential public service,
- (b) a public service, and
- (c) a service maintained for the convenience of shipping or of private interests.

It is a *public service* when it is controlled, maintained or provided primarily to serve the superior interests of the State; it is a *private service* when its main purpose is to serve private needs and interests (vide Recommendation 6). As a public service, it is to be classified as an *essential public service* where the existence of the service, its adequacy and efficiency, are matters of a national concern, and as *public service only* when the public interest requires that it be maintained but its disruption even over a prolonged period would not seriously affect the national interest (vide Recommendation 14).

Where the Central Authority has reason to believe that there are serious irregularities in the discharge of any of the responsibilities of a Pilotage Authority or of any of the organizations to which control powers have been granted by Pilotage Orders, the Pilotage Authority or the organization concerned should be temporarily deprived of its powers or part of its powers, as a preventive measure in the interest of the service, and an *ad hoc* Authority should be appointed to exercise these powers while the matter is investigated and appropriate remedial action taken. When the Pilotage Authority is involved, such action should take the form of an order issued by the Governor in Council pursuant to a recommendation by the Central Authority but, in the case of another organization, the instrument should be a Pilotage Order. The control powers which are temporarily withdrawn should be exercised by the *ad hoc* Authority appointed by the Governor in Council Order, or by the Pilotage Order as the case may be, but should never be exercised by the Central Authority itself.

RECOMMENDATION No. 18

The function of the Pilotage Authority to be entrusted in each District to a locally self-governing public corporation answerable as such to the Central Authority

The real purpose of pilotage legislation is to impose measures of control which will ensure the quality and reliability of the service and in any pilotage organization the most important element is the Pilotage Authority. The most effective means of control is administrative, i.e., licensing, which is the essential function of a Pilotage Authority (vide Recommendation 12). The effectiveness of pilotage legislation is in direct relation to the competence and efficiency of the Pilotage Authority in each District. Licensing is an administrative function of a quasi-judicial nature which presupposes the existence of standards and guide lines established by appropriate legislation, and an informed, unbiased, independent Authority to appraise pilots, exercise constant surveillance and take immediate action to maintain and ensure the quality of the service. This requires constant availability, freedom of action and independence within stated terms of reference, all of which can be guaranteed only if the function of Pilotage Authority is exercised by a locally self-governing federal agency. This function may be entrusted either to an *ad hoc* corporate Crown agency, or an existing local public corporation, whether created under federal or provincial authority.

The reasons stated in Recommendation 16 in favour of a Board (as opposed to a one-man authority), corporate status and its inherent powers for the Central Authority apply, *a fortiori, mutatis mutandis*, to the Pilotage Authority.

The general rule should be that the Pilotage Authority is an *ad hoc* Pilotage Board. This was the concept in the 1873 Pilotage Act but in today's context the rule should be relaxed when warranted by circumstances (providing the quality of the service would not suffer) to prevent over-organization and the unnecessary proliferation of State agencies.

The function of the Pilotage Authority should not be entrusted to an existing public corporation, but to an *ad hoc* Pilotage Board, unless the following conditions are met:

- (a) it is a local corporation;
- (b) it is independent and self-governing;
- (c) its activities are related to the pilotage service;
- (d) its territorial jurisdiction corresponds approximately to the Pilotage District;
- (e) there is no incompatibility or conflict of interest between the corporation's original functions and those of the Pilotage Authority;
- (f) the organization required for the pilotage service will not be overly complicated.

For port pilotage, the authority of the port, if a public port, is the indicated Pilotage Authority since pilotage is an essential feature of the successful functioning of the port. However, the authority of the port should be locally self-governing (as are the Harbour Commissioners) because, otherwise, it would not meet the essential prerequisites of a Pilotage Authority. Furthermore, the responsibility to act as Pilotage Authority should be freely accepted, it being understood that it would be immediately withdrawn if not properly exercised.

On the other hand, the size and complexity of the necessary pilotage organization, combined with the other activities of the available local public corporation, may require that a separate Pilotage Authority be established. It is a prerequisite that a Pilotage Authority have sufficient time available to fulfil the exigencies of the function.

The authority of a port should not be appointed Pilotage Authority when the pilotage service extends materially further than the port limits and its immediate approaches. The authority of a port principally concerned with what directly affects the efficiency of the port organization might neglect what does not naturally fall within the original jurisdiction, e.g., such was the experience when the Quebec Harbour Commissioners and the Montreal Harbour Commissioners were respectively the Pilotage Authorities for the Districts of Quebec and Montreal, i.e., their jurisdiction as Pilotage Authority extended over the River as well. (Vide Part IV of the Report, *History of Legislation*, especially the Montreal District).

Similarly, for canal and lock pilotage, the canal authority is also the indicated Pilotage Authority with the same reservation when territorial jurisdictions do not coincide.

When, for any reason, the Authority of a port or a canal can not serve, unless another convenient public corporation exists, the Pilotage Authority should be an *ad hoc* Board on which local port or canal authorities should normally be represented to ensure the necessary liaison and co-ordination. If the activities of a port are directed by an officer of a central authority, this officer should normally be a member of the Board.

However, in both cases the Central Authority should be free to decide the advantages and disadvantages, the avoidance of possible conflicts of interests being the criterion.

Where the appointment of a board is not warranted because it would be too involved for the number of pilots, the extent of the service existing at the time or about to be provided, and the duties of the Pilotage Authority, the Central Authority should be empowered to form a Pilotage Authority consisting of a single member. In this event, the person so appointed would still constitute a Crown agency corporation when acting as Pilotage Authority. This method should not be adopted, however, unless, for practical reasons, it is not considered advisable to appoint a three-man board.

When the Pilotage Authority is an *ad hoc* Pilotage Board, or a one-man corporation, the principle of decentralization and local self-government should be safeguarded by the procedure of appointing its members and by appropriate statutory provisions which guarantee their independence and freedom of action.

In the same way as a Pilotage Authority's jurisdiction should not extend over more than one Pilotage District, no individual should be permitted to serve as a member of more than one Pilotage Authority to avoid the danger of indirect centralization. Since the competence of a Pilotage Authority is the sum of the competence of its members, the criteria that apply to the Pilotage Authority as a body should also apply to its members. For that reason, they all must, *inter alia*, be residents of, and constantly available in, their District.

The Act should provide that appointments of members are during good conduct and for a fixed term of sufficient duration to allow members to acquire the detailed knowledge of their District necessary for the effective discharge of their responsibilities. It is considered that ten years (except for the first appointments) should be the minimum term. Here again, the termination dates of terms of office should be staggered so that members with the necessary experience always remain on the Board when a new appointee takes office. For the same reason members should be eligible for re-appointment. Members should be subject to dismissal by the Governor in Council for cause, i.e., misconduct, gross incompetence, physical and mental disability. Equally it should be possible to terminate their appointment on account of basic changes in the pilotage organization, e.g., merger, division or abolition of District(s), or when a change is made in the form of the Pilotage Authority, e.g., when it is considered advisable to appoint an existing public corporation and, hence, abolish the existing Board. Such a change should be initiated by an appropriate Pilotage Order which, after any appeal is disposed of (*vide* Recommendation 19), becomes effective only when confirmed by the Governor in Council. This requirement is warranted to preserve the acquired rights of the members and to protect their necessary independence.

A person should not be barred from appointment because he is a Crown officer or a Crown employee; in certain circumstances, the appointment of such an official may well be a requirement. Here again, the criteria should be that there is no conflict between the two functions, that the member resides in the vicinity and that his other occupations leave sufficient time to fulfil his pilotage responsibilities.

To date, members of Pilotage Authorities have been expected to serve without remuneration. This situation was reasonable when pilotage was organized merely as a service for the private convenience of shipping and when the extent of State administrative control was limited to licensing and

its attendant responsibilities. At that time, Pilotage Authorities generally consisted of representatives of the parties immediately concerned and their pilotage duties involved only a fraction of their time. In addition, the management of the District was generally carried out by a full-time, paid Secretary. However, the situation is very different today. Pilotage Authorities are given the responsibility of not only ensuring but, in some cases, providing an adequate, efficient, reliable pilotage service to protect the superior interests of the State and the public. Hence, this situation requires that the representatives of the parties directly interested should not serve as members of Pilotage Authorities and that adequate remuneration should be provided.

However, all the different situations that may occur must be covered in general pilotage legislation. It is considered that the members of a Pilotage Board should continue to serve without pay where pilotage is classified as a service for the convenience of private interests. In such cases, Board members may be representatives of the private interests concerned and should not be remunerated. On the other hand, if the members are not drawn from these groups they should receive remuneration proportionate to their responsibilities and the time they are expected to devote to the exercise of their functions. If Crown officers or employees are appointed, they should receive an additional remuneration commensurate with their added responsibilities. The members should be employed full-time or part-time, depending on the requirements of the local organization, as determined from time to time by the Central Authority through Pilotage Orders. However, any modifications should not affect the rights members acquire during their term of office, unless they consent or, after any appeal has been disposed of (vide Recommendation 19) the Pilotage Orders concerned are confirmed by the Governor in Council.

The remuneration of the members of Pilotage Authorities should be fixed through Pilotage Orders by the Central Authority which is in the desirable position to appraise the value of the services expected in those offices. As an additional guarantee of the independence of local authorities from the Central Authority, although such remuneration should be liable to be increased from time to time as required, it should never be possible to decrease it during a term of office. Since these payments must be met out of pilotage revenue, they should form part of the administrative expenses of the District.

In addition to the power to make by-laws governing corporate operations and the internal organization of the Pilotage Authority's activities, as well as the normal powers inherent in corporate status, each Pilotage Authority should have the following powers:

- (a) to make, by regulations, all necessary local legislation (including legislation for attached areas [Recommendation 8], approved

- pilots [Recommendation 10], and contiguous Districts [Recommendation 9]) within the subject-matters defined in the Act (vide C. 8, pp. 241 and ff.) including rate-fixing and all that this implies, i.e., the permissible numbers of pilots (pilot establishment), target income based on defined working conditions if earnings are pooled (vide C. 6), and setting the conditions governing compulsory pilotage and personal exemptions where this is permissible (vide Recommendations 22 and 23);
- (b) licensing, including reappraisal of the pilots in its District (vide Recommendations 12, 26 27, 28, 29) and in areas attached to the District (vide Recommendation 8), or of pilotage advisors (Recommendation 12) or of shipmasters and mates for personal pilotage exemption certificates (vide Recommendation 23), the partial licensing involved in the approval of pilots outside organized areas (vide Recommendations 8 and 10) together with the surveillance power this requires (vide Recommendations 26, 27, 28 and 29);
 - (c) if so authorized by Pilotage Order, the power to direct the pilotage service and to employ pilots, if necessary (vide Recommendations 13 and 24);
 - (d) if so authorized by Pilotage Order, to operate a pilot vessel service and any other service auxiliary to the provision of pilotage and, in the case of contiguous Districts, to operate such services in co-operation with the other District or for the benefit of both (vide Recommendations 9 and 14);
 - (e) to act as approving authority for the internal by-laws of the statutory corporation(s) of the pilots in its District (vide Recommendations 25).

In addition, a Pilotage Authority might be required by proper legislation to fulfil any other function, provided it is not inconsistent with its licensing power and with any other power it may be required to exercise under the Act.

A Pilotage Authority should have the power to delegate its powers, except those of regulation-making and licensing, to the extent specified by its regulations and according to the procedure and conditions established therein. Since a Pilotage Authority is located in its District, the delegation of power should always be a case of exception to be resorted to only when required to achieve the maximum efficiency of the organization (vide C. 8, pp. 289 and ff.). For example, delegation would be justified for an investigation while discharging the surveillance responsibility (vide Recommendation 28), at the Pilotage Authority's discretion, the investigator could be vested with full judiciary powers of investigation. Normally, it would also be

justified to entrust an Examination Board with the responsibility of ascertaining the competence of qualified candidates in local knowledge and ability to navigate, handle, berth and unberth ships within the District but the final decision should be taken by the Pilotage Authority after considering the report of the Examination Board and representations by other parties. For some members, the criteria for membership on such a Board should be special competence in the matters being investigated and, for others, general competence, in order to prevent biased opinions when an expert is too closely connected with the service. It is essential that pilots sit on such an Examination Board, but it is equally important that qualified mariners, unconnected with pilotage, should also be members. It is not considered that shipowners, as such, should be represented; the argument that they pay for the service is not accepted as valid. Shipowners are part of the public which the Pilotage Authority is charged with the responsibility of protecting. There would be no objection if a fully qualified mariner recommended by the shipowners was appointed to the Board but the final decision should rest with the Pilotage Authority which must remain at liberty to appoint any other person deemed more competent or suitable in the circumstances.

RECOMMENDATION NO. 19

Responsibility for making the necessary regulations to be shared between the Central Authority and Pilotage Authorities, according to their respective jurisdiction, and to be exercised under proper control

Regulation-making is legislation by delegation, done in lieu of, and at the request of, Parliament or a Legislature. It is the normal practice in legislation-making for Parliament to delegate its legislative power to those charged with implementing statutes because the provisions to be so enacted either are impermanent or not of general application. The very nature of pilotage demands such delegation because it is a service whose organization varies widely from time to time and from place to place as the requirements of navigation and public interest change.

Legislative power is delegated by Parliament by defining in an Act the subject-matters of the regulations delegates may make and by defining the procedure for regulation-making, thus establishing the extent of delegated jurisdiction (vide C. 8, pp. 241 and ff.).

It is desirable to establish a system which ensures:

- (a) regulations of the highest standard are made;
- (b) regulations are consonant with, and promote, general pilotage and Government policies;

- (c) all those whose interests are affected are given an opportunity to be heard;
- (d) satisfactory remedies exist against inappropriate, discriminatory or abusive regulations.

The regulations made by the Central Authority pursuant to its original regulation-making powers should be given a distinctive name so as to avoid confusion with the regulations emanating from Pilotage Authorities. It is considered that the term "Pilotage Orders" used in the United Kingdom is most appropriate for the former, and that the latter should be called "District Regulations". The term "regulation" should not be confused with the term "by-law" which should be used to refer to the rules made by the Central Authority and the various Pilotage Authorities to govern their internal activities and corporation administration. These by-laws do not affect third parties (pilots and shipping included) and, therefore, need not be under any form of control other than being available to any one who wishes to consult them.

This division of regulation-making powers between a Central Authority and local Pilotage Authorities was adopted in the 1873 Pilotage Act and has remained unchanged to date. Since each District Pilotage Authority must acquire detailed local knowledge in order to exercise its licensing powers, it is the best qualified and most logical authority to be entrusted with regulation-making for *ad hoc* local pilotage legislation.

In general, Pilotage Authorities have discharged this responsibility satisfactorily, but the Central Authority has lacked effective powers to ensure that complete legislation was provided and, while it could refuse approval, it had no means to force a Pilotage Authority to make a regulation that was considered essential (vide C. 8, p. 245). The number of ultra vires regulations made by Pilotage Authorities does not reflect adversely on their competence in this regard but demonstrates that the existing system of control is inadequate and that present statutory legislation does not meet the requirements of the modern pilotage service.

While the fact that a regulation is ultra vires connotes that it does not fall within the ambit of delegated powers, this does not necessarily mean that it fails to meet a service need. Pilotage Authorities have generally made the additional legislation required to make the pilotage service in their District more effective. Normally, an active Central Authority with sufficient knowledge and time to devote to pilotage problems should be able to detect the illegality of such regulations and, at the same time, realize their value and necessity. The Central Authority's course of action should then be to inform Parliament by submitting appropriate amendments to the Act.

The existence of many ultra vires regulations not only emphasizes the necessity for a complete new statute but also the need for a full-time Central Authority. This conclusion is even more valid since Pilotage Authorities are now often directly involved in providing pilotage services and are no longer in their former disinterested position (vide C. 8, pp. 242-243). In addition, the interests of the State must also be protected.

A system must be devised whereby each District is assured of adequate legislation to meet its needs within overall State requirements. It is considered that this aim could best be achieved by leaving regulation-making powers over local requirements as original powers of the Pilotage Authority but increasing under proper control the Central Authority's powers in this field to the extent of:

- (a) modifying District regulations submitted for approval;
- (b) acting *proprio motu* to make District regulations in lieu of the Pilotage Authority when the latter fails or refuses to do so;
- (c) providing an appeal against such decisions of the Central Authority to an existing administrative tribunal or one created for that purpose (hereunder referred to as the *Pilotage Regulations Appeal Board*).

The first means of control over regulation-making is exercised by Parliament when defining the subject-matters of regulations. Any regulation that does not fall within these limits is automatically ultra vires. This control is implemented by the regular courts at the suit of any aggrieved or interested party.

It is considered that an adequate administrative control over District regulations could be achieved as follows:

- (a) District regulations should be made by the District Pilotage Authority.
- (b) Such regulations can not become effective unless approved by the Central Authority.
- (c) Any proposed regulation should be advertised in the District concerned a prescribed number of days before approval can be granted.
- (d) Any person not in agreement with a proposed regulation should have the right to register an objection with the Central Authority and, unless the objection is withdrawn beforehand, the Central Authority must hold a public hearing in or near the District so that all interested parties, including the Pilotage Authority concerned, have reasonable opportunity to be heard.
- (e) If no objection has been registered within the allowed period, the Central Authority must approve the regulation unless it intends to disapprove or modify it. In such an eventuality, the regulation should be treated as opposed and a public hearing should be

called. The public notice should indicate the reason for the hearing and, if the intention is to modify the regulation, the text of the proposed modification should appear thereon.

- (f) After such a hearing, the Central Authority should have the power to render whatever decision it considers in the best interest of the service, i.e., to approve, disapprove, or modify.
- (g) The regulation should become effective as soon as the Central Authority's decision is rendered and should remain subject to the transmission and publication requirements of the Regulations Act.
- (h) There should be a right of appeal within a prescribed period to the Pilotage Regulations Appeal Board against any decision of the Central Authority following a public hearing as a result of which a regulation is approved or made. There should be no appeal against a decision denying a proposed regulation or approving a regulation whose approval was not contested.
- (i) The power of the Pilotage Regulations Appeal Board should be limited to the right to maintain or reverse the Central Authority's decision; if a regulation has been modified by the Central Authority, an adverse decision would not have the effect of an approval of the regulation as originally proposed; the resultant situation would be that no regulation is made.
- (j) The Central Authority should have the power to make District regulations (including amendments to, and abrogation of, existing regulations) in the name of a Pilotage Authority, if such regulations are considered by the Central Authority to be essential for the District, and provided the Pilotage Authority concerned has been required by the Central Authority to make regulations but has neglected or refused to comply.
- (k) In this case, the same procedure as described above will apply, i.e., publication of the proposed regulation, a public hearing if any objection is received either from the Pilotage Authority concerned or from any other interested party, approval by the Central Authority and appeal to the Pilotage Regulations Appeal Board.
- (l) A public hearing should be held by the Appeal Board before an appeal decision is rendered so that any interested party is given the opportunity to be heard before the final decision is made. Application of the regulation concerned may be suspended pending the final decision of the Appeal Board, provided it is so ordered by the Appeal Board.

It is considered that public hearings before the Central Authority should be held in or near the District concerned because a *venue* at the Central Authority's headquarters or elsewhere away from the District would

defeat the main purpose of the hearings, i.e., to consult all interested parties before a decision is rendered. The same requirement, however, does not apply to hearings before the Pilotage Regulations Appeal Board whose public hearings should be held in Ottawa, unless the Appeal Board decides otherwise.

In the past, the regulations (called the General By-law) of many Pilotage Districts have not been as complete or adequate as they should have been, first, because the Pilotage Authority was more concerned with its administrative duties and, therefore, failed to include in legislation rules that were unanimously and voluntarily accepted by all concerned; second, because the Pilotage Authority's close working relations with the pilots induced it not to make any regulations that would not meet their approval. (Pilotage certificates are an obvious example of this tendency.) One reason for extending the powers of the Central Authority is to remedy this situation by allowing the Central Authority to modify proposed regulations or to act *proprio motu* to protect the superior interests of the State.

It is for the same reason that some means should be provided to ensure that pilotage regulations do not conflict with the general policies of the Government. This explains the recommendation that a Pilotage Regulations Appeal Board appointed by the Government be given the right to affirm or reverse the Central Authority's decisions which result in regulations being approved or made. This Board, however, should not have more extensive power, first, because it does not have the required knowledge of pilotage affairs, either in general or at the District level and, second, because by so doing it would, in fact, supersede and render ineffective the function of the Central Authority.

It is considered that the mandate given by Parliament to the newly created Canadian Transport Commission (National Transportation Act, 14-15-16 Eliz. II c. 69), makes it the indicated Crown entity to discharge the function of the proposed Regulations Appeal Board. Because it is responsible for regulating and co-ordinating transportation in Canada, it is the Crown entity to which Government policies regarding transportation are conveyed and which is charged with implementing these policies. If, however, it is considered advisable to entrust this function to a Board specially appointed for the purpose, it is considered that such a Board should be composed of Government representatives with the designated Minister (vide Recommendation 16) as Chairman, *ex officio*, and the other members being senior officers not lower than the rank of Deputy Minister, appointed by the Governor in Council.

It is considered that public hearings are not indicated at the level of the Pilotage Authority, first, on account of the Pilotage Authority's intimate knowledge of its District and, second, because it is not in the disinterested position required to render an unbiased decision. However, each Pilotage

Authority is at liberty to seek advice and consult, and should encourage any interested party to make suggestions. An efficient Pilotage Authority should make a reasonable effort to eliminate possible objections beforehand—local consultation is one way to achieve this aim.

In order to discourage dilatory appeals, any regulation approved by the Central Authority should become effective immediately, notwithstanding appeal, unless an order to the contrary is issued by the Regulations Appeal Board.

The delay occasioned by the publication of a proposed regulation and by a public hearing before the Central Authority, when required, is justified because legislation should be the result of a deliberate process and should not be made hastily.

The right of the Central Authority to act *proprio motu* at any time is a means to ensure that local legislation remains adequate and does not become obsolete. This power will give any interested party the opportunity to complain to the Central Authority and, should the Central Authority consider the complaint serious enough, it has the power to have the situation remedied.

With regard to Pilotage Orders, a similar procedure with appropriate modification should be adopted:

- (a) A Pilotage Order should be published a certain number of days before it becomes effective and be automatically effective if no objection is received by the Central Authority before the expiration of this period.
- (b) If an objection is filed, the Central Authority should hold a public hearing, unless the objection is withdrawn earlier, and the Pilotage Order should become effective only if it is approved by the Central Authority after the hearing.
- (c) The Central Authority's decision following a public hearing should be subject to appeal within a given number of days to the Regulations Appeal Board, subject to the same limitations which apply to District regulations.
- (d) An Order by the Governor in Council will also be required if a Pilotage Order adversely affects the acquired rights of any member of a District Pilotage Authority (vide Recommendation 18).

Because neither the Central Authority as approving authority nor the Regulations Appeal Board has the right to act arbitrarily and because public interest requires that Pilotage Authorities and all other interested parties be made aware of the policies which guided their decisions, it is considered that the Act should make it mandatory for these decisions to be rendered in writing and, except where only an approval is involved, the grounds on which decisions are taken should be fully enumerated.

RECOMMENDATION No. 20

Pilotage Districts to be self-accounting units under the control of the Central Authority and subject to audit by the Auditor General

Pilotage dues and all other monies officially received by a Pilotage Authority are public monies for a special purpose and, therefore, come under the Financial Administration Act. It is true that Part VI C.S.A. contains some provisions concerning the handling of these funds but, according to the rules of interpretation of statutes, these provisions no longer apply because they predate the general provisions of the Financial Administration Act which makes no exception concerning pilotage dues and pilotage monies (vide C. 5).

In practice, the situation is very different. Each District is treated as a self-accounting financial unit and its funds are not credited to, or deposited with, the Receiver General of Canada, except those belonging to the Consolidated Revenue Fund which are first handled by the Pilotage Authority and later remitted to the Crown. In other words, Pilotage Authorities consider the Crown a third party.

This view is so general that absolutely no control is exercised over the handling of money in Districts where the Pilotage Authority is a local commission. Their books are not audited by the Auditor General and the Government is satisfied if each District renders an annual report which includes a financial statement. On the occasions when a report is not filed, no action is taken except to send a reminder. For instance, the annual report for the District of Richibucto, N.B., has been outstanding for the past five years, i.e., from 1963 to 1967 inclusive, in spite of frequent reminders, which have been ignored. Failure to file a report is not taken as an indication that there is inefficiency in the District or that money may have been mishandled. No investigation is made. When these reports are received, they are considered merely for the information of the Minister of Transport (sec. 332); they are verified casually, if at all, and no effort is made to learn whether or not any funds have been improperly handled. The matter is dealt with as if it were not the Government's concern but merely the internal affair of a private organization unrelated to the Crown.

There is very little difference in Districts where the Minister is the Pilotage Authority. Their annual statements are much more detailed and their books are subject to audit by the Auditor General, but only because departmental officers are involved. Beyond this, each District is considered an independent, self-accounting unit whose Pilotage Authority exercises full and final control over its funds.

It is obvious that no effort was ever made to subject the handling of pilotage money to the provisions of the Financial Administration Act because this would not have met the administrative requirements of the

pilotage service. Pilotage Districts have always been autonomous, self-accounting entities—a status they should enjoy—but the present situation should be regularized, *inter alia*, by making them corporations, as recommended (vide Recommendation 18).

But even the few financial provisions of the Canada Shipping Act applicable to pilotage money are not followed. The only control imposed by the Act is that operating expenses are to be approved by the Governor in Council (sec. 328). As seen in Chapter 5 (pp. 110 and ff.) and in Chapter 8 (pp. 317 and ff.), this requirement is no longer followed (if it ever was) and, therefore, Pilotage Authorities are left free to spend pilotage monies as they see fit. Funds are frequently disposed of, generally judiciously, but, nevertheless, in contravention of the law. The main reason for this state of affairs is that expenditures (other than pilots' remuneration) paid out of pilotage revenues are small. In the most important Districts the main operating expenses, of which the largest item is the maintenance and operational deficit of pilot vessels, are paid by the Crown through indirect subsidies (vide C. 5, pp. 125 and ff.). Furthermore, the illegal application of these funds is made openly under the authority of ultra vires by-laws (vide C. 5, p. 104).

The basic reason for the imperative provision of sec. 328 C.S.A. is still valid because pilotage dues belong to the pilots who have earned them and an authority is needed to authorize the payment of District expenses out of these earnings. The sanction of the Governor in Council replaces the unanimous consent of the pilots concerned and his intervention is viewed as a check against possible abuses by Pilotage Authorities by giving him the opportunity to decide whether or not expenditures are being made in the interest of the service.

Since operating expenses have increased considerably, it is considered the system provided in sec. 328 is both cumbersome and inadequate (vide C. 5, pp. 112 and ff.).

The numerous technical irregularities which exist indicate the need for an adequate system of surveillance and control in which the Central Authority should play an important role in view of the nature of its functions. Such a system is increasingly desirable because of the greater involvement of most Pilotage Authorities in the control of pilotage which results in increased operating expenses and, in many cases, handling the pilots' own money through pooling.

It is considered that, apart from the question of pre-approval of expenditures (which is dealt with at the end of this Recommendation), the desired improvements in financial control could be achieved by the following statutory provisions:

- (a) authorizing the Central Authority to provide through Pilotage Orders (vide Recommendation 17) a financial procedure including a uniform bookkeeping system;

- (b) authorizing Pilotage Authorities to deposit pilotage monies in their own name in one or more accounts in any chartered bank in Canada;
- (c) authorizing Pilotage Authorities to write off uncollectable debts, subject to prior approval of the Central Authority;
- (d) requiring each District to file with the Central Authority a complete detailed annual financial report in the form prescribed by the Central Authority in its financial regulations;
- (e) prescribing an audit of District annual reports by the Auditor General who should be required to submit a report of his audit to the Central Authority indicating, *inter alia*, any financial transactions effected contrary to any statutory or regulatory provisions, or without following the prescribed procedure or obtaining the required authorization;
- (f) requiring Pilotage Authorities to submit additional reports providing specific information requested by the Central Authority and to place their books, records and supporting documents at the disposal of the Auditor General whenever he so requests;
- (g) providing a procedure, as stated in Recommendation 17, for the temporary suspension of a Pilotage Authority pending investigation as a means of enforcing the Central Authority's power of surveillance in this field.

The new Pilotage Act should also state that the Financial Administration Act does not apply to the handling of pilotage monies by Pilotage Authorities, except for certain provisions which should be listed in the Pilotage Act, e.g.,

- (a) the definition of such expressions as public money, fiscal year and the powers of the Auditor General;
- (b) the provisions pertaining to Crown corporations (Part VIII, F.A. Act), with the reservation that the Pilotage Authority's budget should be submitted to the Central Authority for approval with or without modification by the Central Authority subject to a right of appeal to the Pilotage Regulations Appeal Board;
- (c) the provisions regarding civil liability and offences (Part IX, F.A. Act).

A Pilotage Authority should enjoy the full financial powers of a Crown Corporation. It should be required to have its operating budget authorized annually by the Central Authority and special authorization should be required for extraordinary and unforeseen expenditures. The procedure for the approval of expenditures should be the same as is recommended for the approval of District regulations (vide Recommendation 19), i.e., publicity,

public hearings if objections are received, and right of appeal to the Pilotage Regulations Appeal Board, together, at this stage, with the Central Authority's right to modify proposals. Neither the Central Authority nor the Pilotage Regulations Appeal Board should have any authority to intervene *proprio motu* to reduce or modify a budget already approved, but the Central Authority should have the power to act in lieu of a Pilotage Authority which neglects or refuses to present a budget, or to seek a special expenditure authorization, to the prejudice of the service and public interest.

RECOMMENDATION No. 21

**A central pilotage equalization trust fund to be created to
finance authorized operational deficits incurred by Pilotage
Districts**

Under Part VI of the Canada Shipping Act, a Pilotage District must be financially self-supporting and, if one which has been created fails to support itself, it must be abrogated. There is no provision for supporting Districts financially, e.g., by subsidies, and, since each such District is considered a separate, independent unit, no District can be required to finance a less fortunate District.

This principle was consonant with pilotage conceived as a private service to shipping when the State was prepared to exercise control and surveillance without cost to the public. This is a relic from the past when each sea port was left to fare for itself and when pilotage was considered a local convenience only.

Such a concept is now outdated. Although each pilotage service is essentially local in character, it remains part of a national system aimed at enhancing the effectiveness of our navigable waters as part of the overall transportation system on which the economy of the country depends. The criterion for the creation or retention of a District is no longer whether it is financially self-supporting, but whether the national interest warrants its existence. If this is the case, funds must be provided. The old principle remains that when a service is not required in the national interest but is maintained solely for the convenience or protection of private interests it must pay its way.

The question of financing Pilotage Districts is complex because local requirements are the deciding factors. All things being equal, essential services in one District may produce a deficit while the same services in other Districts may yield a profit, e.g., (apart from extreme situations such as Goose Bay and Churchill) the Saint John, N.B., District compares unfavourably with the Cornwall District.

While pilotage services must be provided in Saint John for the full twelve months of the year, the greatest demand occurs during the three winter months and, although traffic diminishes during the other nine months, the number of pilots required is determined by the winter demand. In addition, their operational costs are comparatively high, mainly because sturdy, well found pilot vessels are required to provide uninterrupted service in the boarding area where severe conditions prevail. By contrast, in the Cornwall District the flow of traffic requiring pilots is more evenly spread throughout the nine-month season, with the result that a smaller number of pilots is required to meet the same average demand. Furthermore, operating expenses are minimal because no pilot vessels are required since the pilots embark and disembark at wharves or in the locks.

If the present legislation was strictly followed, the Saint John District would be abrogated, unless the pilots were satisfied with very little remuneration. In this event, either the quality of the service would suffer, because the expert pilots which the Saint John Harbour and its approaches require would not be attracted or, if the dues were fixed at the level required to bring in the necessary revenue, the rates would be so discriminatory that most ships would by-pass Saint John, if at all possible, and those that did call would bear a disproportionate burden of rates. On the other hand, in the Cornwall District, either the rates would be comparatively too low, or the pilots' remuneration unduly high, with no professional justification when compared with the remuneration of pilots in other Districts.

The compulsory payment of dues, which was adopted by the 1873 Pilotage Act and has since remained unchanged, was merely a device to permit a District to raise more money locally when normal revenue was insufficient. The fact that this is indirect taxation is apparent from the absolute exemptions granted by statute on the basis of a vessel's ownership and flag, with no consideration for the safety of navigation. Additional revenue is secured by withdrawing relative exemptions as requisite. Hence, local traders who do not require pilots complain that they are required to pay dues in some Districts but are exempt in others (vide C. 7, p. 228). It is interesting to note that the same device is used in other countries where the principle that the service should be self-supporting is the rule. They often call the system compulsory pilotage but the only penal sanction is the payment of dues.

Such a system, even as a means to raise funds, is of doubtful value since it has major inherent weaknesses: first, the need for the service and the extent of that need are obscured; second, the aggregate costs in a District are often unwittingly increased. One unwarranted consequence is to create an artificial demand for pilotage services, e.g., non-exempt ships which do not require a pilot employ a pilot as a rule simply because they have to pay dues, thus often forcing an increase in the number of pilots and, hence,

creating additional pilots' remuneration derived from aggregate District earnings. It is essentially wrong to use direct or indirect compulsory pilotage merely to create employment for pilots. In each District, the number of pilots should remain at a level sufficient to meet the true demand, and safety of navigation should be the sole criterion for imposing compulsory pilotage (vide Recommendation 22).

In order to avoid discrimination against certain ports or areas and to ensure that adequate pilotage service is available at reasonable cost wherever needed in the national interest, financial aid must be provided for Districts and areas which are not self-supporting. This aid might be provided either by shipping, or the Government, or both, i.e., from operational surpluses of, or contributions from, more privileged Districts, or through subsidies. It is considered that both sources should be utilized.

Since the cost of a service should be borne by those who benefit from it, the expenditure of public money for the organization, maintenance and operation of a service is justified only if, and to the extent, the public at large benefits. It is unjustified to spend public money to subsidize a service which serves a private interest only. On the other hand, to withhold subsidies from a service from which the public benefits, with the result that it is wholly financed by the users through inordinately high rates, amounts to indirect, discriminatory taxation against the users.

In this connection, "the public" connotes those to whom public monies belong, i.e., the Canadian people. When an appreciable number of foreigners benefit from a service, a method should be found to ensure that contributions from Canadian public funds serve only the interests of the Canadian public, unless a direct contribution is compensated by a reciprocal agreement or by services provided by another country from which the Canadian public derives an equal benefit free of charge. In the field of pilotage, this situation arises especially on the St. Lawrence-Great Lakes system where a large number of vessels are merely in transit in Canadian waters; it exists also, but to a much lesser extent, on the Pacific Coast.

It is considered that the users should contribute to the maintenance of the service as a whole, i.e., considered on a national basis. The concept that the pilotage revenues of a District should not be used for the support of another District is outmoded and has no place in the organization of modern pilotage. Vessels which normally take pilots derive great advantage from the availability of an adequate pilotage service wherever the contingencies of trade require them to proceed. Hence, it is reasonable not only that they pay for pilotage services rendered but also that they contribute to the overall organization which makes these services possible.

The permissible extent of such contributions from shipping is determined by the rates which can reasonably be charged for services and the total amount required to maintain pilotage as an organization. "Reasonable

rates” are established on the basis of normal charges elsewhere for comparable service (i.e., prevailing rates taking into consideration the local circumstances of each case, such as cost of living) or what can be charged without harming the national economy.

The extent of the contribution from the public should be the amount necessary to meet any aggregate deficit. The fact that the public derives a substantial advantage from services classified as essential or in the public interest does not imply that a contribution in support of such services must be made out of public funds but merely that the State should be required to meet that part of the cost that can not reasonably be charged to the users. On one hand, the State assumes a substantial burden when it finances the Central Authority and its activities; on the other hand, the pilotage dues paid by the users are passed on to the public as part of the price charged by the carriers for transportation. The ultimate responsibility of the State is to ensure that the adequacy of such services is not adversely affected by financial factors. A mere guarantee that the State will make good any net aggregate deficit is in itself an adequate contribution, even if no actual disbursement is eventually made. It is not considered advisable that Crown assistance to such a fund should ever take the form of a loan, thereby committing future contributions from shipping.

The application of the foregoing principles requires the creation of a central fund, which might be referred to as the Pilotage Equalization Trust Fund. Its handling and administration should be entrusted to the Central Authority which, as a result of its supervisory position, its financial independence, and its detailed, up-to-date knowledge of the overall pilotage situation, is the indicated administrator and trustee.

The revenues of the fund should be derived from:

- (a) contributions of the users through the participating Districts according to applicable rules established by Pilotage Orders;
- (b) fines and penalties of any nature paid by vessels, pilots or any other person pursuant to any provision of the proposed Pilotage Act;
- (c) amounts appropriated from time to time by Parliament for this purpose out of public funds.

In view of the Central Authority’s detailed knowledge of pilotage, the control it exercises over District expenditures and contributions from the users, and its functions as administrator and trustee of the fund, it should be responsible for seeking the required financial assistance from Parliament. Although federal assistance may take the form of an outright statutory grant, it is considered that the adoption of the estimates procedure is more realistic and provides more flexibility. Estimates simply guarantee that money is available on the basis of expected costs, and public funds are expended only if and when the occasion arises.

To manage such a fund it is necessary to determine the contributors and the extent of their contributions, and the beneficiaries and the extent of the benefits they may derive.

By determining the participants the question of beneficiaries is automatically solved. Contributions by the users (in reality a form of tax) and the State's contribution are permissible only to support services in the general interest and should not be used to maintain those which serve private interests primarily and from which the State derives only indirect benefit.

Therefore, the participants, including both the Districts that are called on to contribute to the fund and those which draw benefits from it, should be only those Districts where pilotage is classified as either a "public service" or an "essential public service". As seen in Recommendation 17, this classification should be made by the Central Authority through Pilotage Orders. The rights of all interested parties and of the Crown are well protected by the procedure for making Pilotage Orders as recommended in Recommendation 19.

It is a very complex problem to establish the definition of contributors and beneficiaries and to determine a scale of contributions and benefits because there is not, and can not be, uniformity throughout the various Districts with respect to the status of pilots, the form of their remuneration, their conditions of work and the value of their services.

Many solutions may be devised but there appears to be no single, simple formula and, therefore, a combination of methods is indicated so that every status of pilot can be included.

The principal methods appear to be:

- (a) To determine the contribution from users as a uniform, general percentage surcharge applied on a national basis, i.e., on all pilotage dues to be paid by all participating Districts. To ascertain the extent of the benefits the Districts in financial need require, it is necessary to fix for each District individually an appropriate guaranteed minimum income for its pilots. The required contribution from the Equalization Fund would then be the aggregate of the difference between the guaranteed minimum income and the actual remuneration received by the pilots of the District. In all other respects this method retains the feature that the pilots' remuneration consists of the net earnings of the District. Hence, there is no question of maximum remuneration. Therefore, the criteria for fixing rates must not be prevailing rates but the total amount needed to meet the total cost of the District, with the proviso that the resultant rates must not place an inequitable burden on the users.

- (b) To fix the rates at the value to the user without considering the financial requirements of the District, thereby causing an operational surplus or deficit. This method requires fixing in each District where the pilots are not Crown employees an adequate minimum and maximum remuneration for the pilots so that an operational deficit or surplus may be calculated. A deficit determines the amount of the benefit receivable while a surplus determines the contribution to be made by the District to the fund. This system works well in Districts where the pilots are employees and, therefore, are paid a remuneration which is unrelated to the total dues collected and which is based, not on work done, but on time available for duty. It may also be adequate in Districts which operate a pooling system as long as provision is made for the pool to run a deficit and for a pilot's share to be computed without taking into consideration the amount available in the pool. To achieve this, the pilots' remuneration would have to be fixed by regulations, in the same way as a salary, on the basis of time available for duty and according to the same rules, i.e., a fixed remuneration for a basic period of work with extra remuneration for overtime or for work in special conditions as an incentive to meet the demand in peak periods.
- (c) By adopting the same method as in (b) with the difference that the pilots' remuneration is paid from a different source of revenue than District operating expenses. Under this method, the price paid by the users for pilotage comprises two distinct charges, one called "pilotage fees", which constitute the pilots' remuneration, and the other called "pilotage dues", which are applied to the payment of both District and service operating expenses other than the pilots' remuneration. If this method is adopted, the Equalization Fund system does not apply to the pilots' remuneration but only to financing District operations. There is no question of establishing a minimum or maximum remuneration for the pilots. All that is required in this regard is to establish the fee rates at such a level that the total fees produce the aggregate target income. Then the dues represent the difference between the permissible charge to users for each service and the share attributed to the fees, with a resultant deficit or surplus in the operating expense fund of the District. It is considered that normally such a system would only add complications without material advantages because the basic problems are merely transferred. The pilots do not receive the guarantee and security provided by a fixed minimum remuneration; if their actual remuneration unexpectedly falls substantially short of the target income, the pilots will receive no compensation and the fee rates will not be adjusted the following

year unless it can be established that the discrepancy was not due to non-recurring events but to a basic change in the situation on which the calculation of the rates was made. This method also has the disadvantage of being applicable only where the aggregate District earnings are at least sufficient to provide the pilots with adequate remuneration, e.g., this would not be the case in Churchill and Goose Bay. Furthermore, this method does not apply when the pilots are employees.

- (d) Another method is to arrange to collect the users' contributions through the pilots' own remuneration. With this system, the aggregate pilots' remuneration corresponds to the net earnings of the District; therefore, there is no question of an operational surplus or deficit. Pilots who are in receipt of remuneration exceeding a certain level are required to contribute to the Equalization Fund while those whose remuneration falls below a certain level are entitled to benefit from the fund. This is the method adopted in Denmark. All Danish pilots who receive an annual income in excess of the salary provided for the 23rd grade in the Civil Service are required to contribute to the fund 27% of the excess. On the other hand, pilots on stations where the remuneration is below a certain level are entitled to receive benefits from the fund, if they so request, and as determined by specific regulations (*vide* Appendix XIII). In the Danish system, the conditions governing contributions allow for a wide variation in remuneration between Districts. This is equitable because the pilots in different Districts with comparable time of availability for duty are not necessarily entitled to the same remuneration, e.g., remuneration should be higher in Districts where pilots are regularly employed, where pilotage is more exacting and requires a higher degree of qualification, where responsibilities are heavier because of the size and class of ships involved (the same finding was made in the United Kingdom, *vide* Appendix XIII). With such a system it is considered that, in order to avoid contention, the conditions governing contributions should be uniformly fixed for all Districts and should commence at a common average level. Any adverse effect resulting from such an arbitrary rule could be corrected by taking into account the contribution to the fund when fixing the target income for each District. Here again, this system does not apply where the pilots are employees. If this system was adopted, care would have to be taken that the pilots' remuneration for the purpose of income tax would be the net income after deducting compulsory contributions.

Of all these systems, it is considered that the most flexible and the most equitable is method (b) which is based on the operational surpluses and deficits of Districts. *Inter alia*, it has the marked advantage of disassociating the pilots' remuneration from charges made to users and is also more realistic in that essentially most contributions and benefits are governed by the local peculiarities and requirements of each District.

However, from the point of view of simplicity of procedure and ease of application, a variable system based on method (b) for Districts where the pilots are employees of their Authority, and on method (a) for the remainder, has considerable merit. In the present context of the organization of pilotage in Canada, the inequalities inherent in method (a) would be negligible in practice, as may be ascertained by referring to the analysis of indirect subsidies paid in 1965 (vide Chapter 5, Table "A", p. 126 and Comments, pp. 127 and 128). If such a fund had existed in 1965 and a surcharge of 14 per cent had been made, the net contribution of the following main Districts would have been: Montreal, 5.7 per cent, Quebec, 2 per cent, British Columbia, 0.2 per cent and Cornwall, 4.9 per cent. These four Districts accounted for 83.9 per cent of the total cost of pilotage in Canada (excluding the Great Lakes Districts). On the other hand, the following Districts would have benefitted as follows: Halifax, 23.6 per cent, Saint John, N.B., 34.8 per cent, Sydney, 22.4 per cent. These three Districts accounted for 9.5 per cent of the total cost.

Other methods may be devised. It is considered that establishing the system under which users are required to contribute is essentially a practical problem based on a situation of fact which should be a responsibility of the Central Authority to solve. Whatever method is adopted, it should be reasonably practical, simple and equitable.

The Central Authority possesses all the necessary powers to control the expenditures of Pilotage Authorities and to avoid unwarranted demands on the fund. The number of pilots, target income or salary, as the case may be, will be controlled by the requirement that regulations must be approved, and actual spending ratified by the procedure for approving budgets and unforeseen expenditures. In exercising such controls, the Central Authority should ensure that a Pilotage Authority does not exceed its financial means, including any expected grant from the Equalization Fund, bearing in mind that the permissible amount of a grant is determined by the extent of public interest. Hence:

- (a) Where pilotage is classified as an essential public service, financial considerations should never be an obstacle to prevent any step needed to provide the best pilotage service local circumstances require, and any operational deficit that remains after the users are charged an equitable price must be met from the fund.

- (b) Where pilotage is classified merely as a public service, grants from the fund should be issued only to the extent necessary to maintain a service which is adequate to protect public interest.
- (c) Where pilotage is classified as a private service and the public derives only indirect benefit, care should be taken before approving expenditures to ensure that the Pilotage Authorities concerned can afford them from their own resources because such Districts can not draw benefits from the Equalization Fund.

RECOMMENDATION No. 22

Compulsory pilotage to be imposed when, where and to the extent required in the interest of safety of navigation

For safe navigation in confined and difficult waters, local knowledge and experience are essential. The *raison d'être* of organized pilotage is to provide local experts for vessels whose Masters and mates do not possess the required knowledge and experience of navigating confined waters. Pilotage becomes compulsory when such local experts, i.e., pilots, are imposed on vessels by appropriate legislation.

There are degrees of compulsory pilotage. Pilotage is compulsory in the full sense of the term (referred to hereunder as "compulsory piloting") when a vessel must be navigated by a licensed pilot. There is also a modified form (referred to hereunder as "compulsory taking of a pilot") when a Master is required to have on board a licensed pilot while his ship is being navigated, whether or not he makes use of the pilot's services or advice. The foregoing is not new in Canadian legislation. Part VIA C.S.A., which was enacted in 1960 as special pilotage legislation for the Great Lakes, imposes "compulsory piloting" for vessels in "designated waters" and "compulsory taking of a pilot" for those in "undesignated waters". For reasons of clarity the new Act should provide statutory definitions for these terms.

Since compulsory pilotage is interference by the State with the liberty of individuals, it should never be resorted to unless the superior interests of the State so require and should always be limited to the extent of that requirement.

When vessels must navigate in confined waters the superior interests of the State may be jeopardized and, hence, compulsory pilotage may be imposed where:

- (a) a maritime casualty would seriously disrupt navigation to the marked disadvantage of the national economy; or
- (b) safe, speedy transits and movements which must be effected in the national interest can not be achieved unless vessels are navigated by mariners with adequate local knowledge and skill.

Hence, the main character of the method adopted should be flexibility, bearing in mind the rapid progress now being made in the field of electronic navigational devices and communications. Compulsory pilotage which may be necessary in certain areas to-day may not be necessary to-morrow; the reverse may also be true, *inter alia*, on account of the ever increasing size of vessels.

Appraising the national importance of a pilotage service is a task within the competence and responsibility of the Central Authority since it forms the criterion which authorizes the Central Authority both to create Districts that are not financially self-supporting and to help finance them afterwards. Such an appraisal will be automatic if, as recommended in Recommendation 17, the Central Authority is required to issue Pilotage Orders classifying the various pilotage services in Districts and areas according to their degree of importance in the national interest. Various services within one District may draw different classifications, more particularly in merger type and coastal Districts. Hence, the compulsory system should not necessarily be applied on a District basis but should have flexibility to permit the degree of compulsion to vary from place to place within a given District, according to the requirements for safe navigation.

It is considered that the Act should stipulate that:

- (a) Where a pilotage service is classified as essential, compulsory pilotage should apply automatically.
- (b) Where a service is classified merely as a public service, the compulsory rule should apply only if specifically imposed by the Central Authority in a Pilotage Order and subject to any general restrictions the Central Authority may impose.
- (c) Where a service is classified as being primarily a private service, compulsory pilotage should never be imposed.

Where compulsory pilotage applies in accordance with this method, the next question is to determine which vessels are potential safety risks in a given local area unless they are navigated by mariners possessing local competence. The fact that this is essentially a local problem can be readily appreciated by comparing the great difference in the governing factors, e.g., navigating a large vessel in Halifax is much simpler than in Courtenay Bay, Saint John, N.B.; conducting a vessel through the Railway Bridge on the Fraser River requires a much higher degree of local knowledge and experience than in the rest of the New Westminster District; the limitations and problems of navigation posed by the St. Fulgence Channel are altogether different to those which obtain on the Saguenay River up to Port Alfred; a vessel considered small for Halifax or the Quebec District might well pose problems of navigation in St. John's, Newfoundland, and in various ports along the New Brunswick coast; manoeuvrability in confined waters, quick

response, underkeel water clearance, length and beam are among the many factors which may make a ship a safety risk in one locality but would have little significance in others.

Therefore, the question to be resolved is whether local competency is needed to navigate a given vessel in the prevailing or expected conditions during a trip on a given route. The ideal procedure would be to appraise every case separately but this would be impractical in view of the unwarranted delays it would cause and, therefore, a more practical solution must be found, i.e., to make legislative rules based on acquired experience and possibly leave the relatively few exceptions for appraisal on a case basis by the Pilotage Authority concerned.

Two methods may be adopted to impose compulsory pilotage:

- (a) the method used in Part VI C.S.A. whereby the compulsory system applies to all vessels unless they are specifically exempted either by statute or by regulations;
- (b) the reverse method to the effect that the vessels affected are those subjected to compulsory pilotage by a specific provision in the statute or the District Regulations.

It is considered that method (b) should be adopted. The nature of method (a) and the unsatisfactory results derived from it are strong arguments in favour of method (b). Since compulsory pilotage interferes with basic freedoms, it should not be imposed indiscriminately but only when necessary and to the extent warranted as the result of positive, deliberate judgment. Under such conditions, any abuse becomes apparent and is likely to be challenged. Under method (a), there is a danger of a passive attitude being taken with the result that the matter will be only partially covered. If the ensuing incomplete legislation is enforced (a matter in which the Pilotage Authority has no discretion when discharging its administrative functions), certain parties may be gravely prejudiced. The manner in which permissible exemptions for small foreign vessels (subsec. 346(c) C.S.A.) were dealt with in the various District By-laws, together with the failure of Pilotage Authorities to enforce the obviously inequitable legislation that ensued, is a fair example of the unsatisfactory situation that may develop (vide C. 7, pp. 227 and 228).

Although the full extent of the application of compulsory pilotage varies from place to place and, therefore, can not be defined in legislation of general application, some vessels regularly employ a pilot because neither the Master nor the mates possess the necessary local competence while, at the same time, other vessels should always be required to employ a pilot because public interest demands that no undue risk be taken. It is considered that to avoid repeating the same provision in all District Regulations, and also to prevent possible opposition and contention on a subject that should be beyond question, these cases should be specially covered in the Act itself,

leaving to the Pilotage Authority in each District the task of completing the scope of application of compulsory pilotage through District Regulations.

Therefore, it is considered that the Act should contain the following *minimum* statutory requirements for the application of compulsory pilotage in Districts, or parts of Districts, where compulsory pilotage applies:

- (a) compulsory taking of a pilot by all foreign-going vessels employed in overseas trade or voyages whose gross tonnage exceeds 1000 tons;
- (b) compulsory piloting imposed on vessels carrying cargoes that, for the purpose of safety of navigation, are defined in Pilotage Orders as dangerous cargoes;
- (c) compulsory piloting imposed on vessels over 1000 tons gross when navigated as dead ships.

By the nature of their profession, the Masters and mates of foreign-going vessels engaged in overseas trade or voyages (i.e., not regularly engaged in home trade or inland coastal voyages) seldom travel regularly enough in any confined waters to acquire and maintain the necessary local knowledge and experience to navigate their vessels in such waters expeditiously and safely (vide C. 3, pp. 41 and ff.). The exceptional cases where this is not so should be assessed on an individual basis through the issuance of personal exemption certificates.

The size of vessels is a factor that must be considered. Vessels under a certain tonnage can not reasonably be considered to create any serious hazards to navigation under normal conditions. In Part VI C.S.A., a very low limit of 250 tons net was set; to fix an absolute minimum in to-day's context, it is considered that 1000 gross tons would be more appropriate. Gross tonnage should be used instead of net tonnage because gross tonnage is more closely related to the size of vessels (vide C. 6, p. 171). A corresponding minimum in displacement tonnage should be stipulated for vessels not possessing a gross tonnage certificate.

Vessels carrying dangerous cargoes, whether local traders or not and irrespective of their size, are a great potential danger not only to the safety of navigation but also to the safety of the communities surrounding the confined waters through which they pass. The interest of the public requires that these vessels be forbidden to navigate unless conducted by a person fully competent to navigate them in the confined waters in question. The statutory definition of "dangerous goods" contained in subsec. 2(21) C.S.A. is not adequate for this purpose. The proposed Pilotage Act should contain its own definition which pays due regard to the safety of the public and of navigation. What constitutes a dangerous cargo for the purpose of compulsory pilotage should be made a subject-matter of the regulation-makings powers of the Central Authority, i.e., to be determined through Pilotage Orders.

Vessels being navigated as dead ships always constitute a serious navigational problem in that they and the assisting tugs must operate together as navigation units. It is most important that navigators fully trained in such teamwork and competent in local navigation be in charge of such units.

The Pilotage Authority of each District where compulsory pilotage applies should be responsible for completing this general minimum scheme of compulsory pilotage by extending its scope of application to other types and classes of vessels and by lowering the tonnage limit below 1000 tons gross as warranted by local safety requirements. However, it should have no power to modify the statutory rules otherwise, e.g., by raising the tonnage limit to 2000 tons gross. This should be done realistically and not theoretically. As stated earlier, compulsory pilotage is essentially a question of local fact. Past experience should be considered, e.g., a class of ships which have regularly navigated without pilots in the past should not be arbitrarily subjected to compulsory pilotage because of an occasional accident. There must be specific and realistic reasons for imposing compulsory pilotage. It must be borne in mind that pilots themselves are occasionally involved in shipping casualties. Although accidents raise questions of doubt, they do not necessarily establish that a class of ships is a safety risk. The circumstances surrounding each casualty should be investigated to reveal the real cause; any doubt should be resolved in favour of safety of navigation and regulations should be elaborated on the basis of experience so gained. This implies that, where compulsory pilotage exists, the Pilotage Authority should have power to carry out complete investigations into shipping casualties, even when no pilot is involved, in order to establish the cause of the casualty. There should be coordination if the casualty is to be the subject of an investigation under Part VIII C.S.A. (vide Recommendations 28 and 36).

Pilotage Authorities should resort to compulsory piloting only in exceptional circumstances, i.e., for vessels that are considered to be extreme safety risks, either on account of their size or because they are large passenger vessels, or for other reasons, always bearing in mind the added responsibilities such a move implies (vide C. 2 p. 29).

However, the Act should also stipulate the right of a pilot to demand at any moment he be given charge of the navigation of a vessel which he has boarded on account of the "compulsory taking of a pilot" requirement when, in his opinion, he should take charge for the safety of navigation (but never solely for the safety of the vessel). This is consonant with the very purpose of compulsory pilotage; a pilot should be the guardian of the public interest when he is on board. But this is an extraordinary power which should not be resorted to except when a pilot has grave reasons for taking such action.

The classifications contained in secs. 346 and 347, C.S.A. should be avoided, e.g., nationality of vessels and identity of owners, since such criteria, which are consonant with a system where compulsory pilotage is a

form of taxation, are inconsistent with a system which requires the employment of pilots to promote the safety of navigation. There is no valid reason for excluding from the application of compulsory pilotage certain vessels simply because they are warships, or hospital ships, or because they belong to the Crown. Such characteristics do not *ipso facto* endow their navigators with the required local knowledge and experience.

Neither does the fact that vessels are engaged in special voyages (of the type mentioned in sec. 346 C.S.A.), in fishing, or in salvage operations, or are entering a harbour for refuge, alter the situation. Most fishing vessels would normally not be obligated because of their size, but not to obligate them as a group merely on account of their occupation is wrong from the point of view of safety. Vessels engaged in salvage operations or entering a port for refuge may well be serious safety risks on that account and only a grave emergency should release them from compulsory pilotage. This should not be taken to mean that fishing vessels should be subjected to compulsory pilotage; most fishing vessels will not fall within the categories of vessels subjected by statute to compulsory pilotage and whether any category of them should be subjected through regulations would be (as for any other category of vessels) a question of safety of navigation in the light of local conditions. When safety is the main factor, there should be no room for preference or discrimination.

Since safety of navigation is the sole aim of compulsory pilotage, there will always be *sui generis* cases which can not be covered in legislation without causing grave injustice to others but which should be subject to compulsory pilotage if the safety of navigation so requires. The only solution is to deal with these cases administratively as they occur. The Act should give power to Pilotage Authorities to require normally non-obligated vessels to take a pilot whenever there are grounds to believe that, without a pilot on board, such vessels might be an unwarranted safety risk in the prevailing circumstances. If a vessel would not otherwise have taken a pilot and the owner refuses to pay the pilotage charge(s), the dispute should be submitted for adjudication to the Admiralty Court; the vessel should be made to pay only if the Court finds that the Pilotage Authority's decision was justified in the circumstances; if such proceedings are unsuccessful, the costs should be borne as an operating expense of the District.

With the proposed system, any aggrieved or interested party has ample means at his disposal to oppose any unwarranted decisions. Aside from the required reference to the Admiralty Court mentioned in the preceding paragraph, compulsory pilotage is enforced through the regular courts where an aggrieved party is given full opportunity to defend his rights. Furthermore, because the sole criterion for compulsory pilotage is the safety of navigation, regulations that are not justified on this ground will be *ultra vires* and, therefore, can not be enforced before any court if their validity is attacked. Since the provisions defining the nature and the extent of compulsory

pilotage form part of the regulations, its application will be governed by the various means of control to which District Regulations and Pilotage Orders are subject (vide Recommendation 19), thereby ensuring that compulsory pilotage is not wrongfully imposed.

Under the proposed method, there are no exemptions as normally understood because the rule is that no vessel is subject to compulsory pilotage unless it falls within one of the categories of vessels specified in the Act, or in the District Regulations. There are no "exempt vessels", only "obligated vessels". Hence "exemptions" refer to the special circumstances where an "obligated vessel" is relieved of compulsory pilotage:

- (a) personal exemption;
- (b) unavailability of licensed pilots(s);
- (c) emergency.

The question of personal exemptions ((a) above) is dealt with in Recommendation 23 which follows.

With reference to the non-availability of pilots (vide C.7, pp. 230 and ff. and *Comments*, p. 235), it is the responsibility of each Pilotage Authority to keep a sufficient number of pilots at any pilot station to meet the expected demand. Vessels that have complied with all requirements should not encounter costly delays because a Pilotage Authority fails to fulfil this responsibility. If a Pilotage Authority does not provide a pilot when a vessel arrives within the prescribed boarding area, the Master should be entitled to employ an unlicensed pilot, if one is available, or to proceed without a pilot, unless the vessel is one to which "compulsory piloting" applies.

If there is a shortage of pilots, those available should be assigned to vessels that have arrived at the pilot station, or are about to arrive, by an order of precedence determined by the requirements of safety of navigation: first, vessels subject to "compulsory piloting"; second, vessels which are merely required to take a pilot on board; and, finally, the "non-obligated" vessels which have requested a pilot.

Since vessels can now communicate with the shore at almost any distance, Pilotage Authorities should be empowered to make regulations adapted to every local situation which require vessels to order pilots a fixed number of hours in advance. Such orders would enable Pilotage Authorities to make the necessary number of pilots available. A penal sanction might be provided for failure to comply with the requirement for advance notice, and, in addition, the Act should provide that a vessel which had not complied should be required to bear any inconvenience caused by its own failure, i.e., the stipulated period of advance notice would commence either when it arrived in the boarding area or when the overdue message (if sent) was received. The result would be that such a vessel would be unable to benefit

from the exemption for non-availability of pilots until the required delay had expired, and, in the meantime, available pilots would be assigned by priority to all vessels that had complied with the regulation. But under no circumstances should such a vessel be delayed if, without creating a shortage of pilots, a pilot was available or became available, nor should such a vessel be delayed as a means of arbitrary punishment.

In an emergency involving safety, a vessel should proceed without a pilot or, if a pilot is on board, under another navigator, if circumstances warrant, e.g., obvious unfitness, but the regulation should apply as soon as the emergency ceases. The onus of proof that an emergency exists must rest on the vessel.

Since compulsory pilotage is imposed because the interest of the State requires it, proper means of enforcement should be provided:

- (a) For failure to take a pilot on board there should be a severe penalty, such as double the pilotage dues the vessel would otherwise have been called upon to pay. Such a penalty should be considered a pilotage claim for the purpose of collection.
- (b) In addition, if compulsory piloting applies, a vessel should be subject to arrest and detention until its navigation is placed under the control of a licensed pilot, together with all necessary means of enforcement (vide C.S.A. Part XV).
- (c) When a pilot is taken on board and either compulsory piloting applies or, with good reason, a pilot has demanded he be given charge of the navigation, if the vessel is not navigated by the pilot, the Master should be liable to a considerable fine (e.g., \$500). (This is at present the penal sanction, *inter alia*, for failure to comply with the compulsory pilotage requirement on the Great Lakes, vide C.S.A., sec. 375D.)

RECOMMENDATION NO. 23

Personal exemptions to be an essential feature of any compulsory pilotage scheme and the Act to guarantee the right to such personal exemptions to Masters and mates who are competent to navigate their vessels safely in District waters

Since the reason a pilotage service exists is to remedy a situation of exception with regard to navigation, a service should never be established unless it is clearly required. This principle, which applies to the creation of Districts, is *a fortiori* valid when the question arises of compelling vessels to employ a pilot.

From a safety point of view, the ideal situation is for a Master or his mate(s) to navigate a vessel but this is not always possible in confined waters where local knowledge and experience are essential.

To be a Master or mate requires considerable knowledge of navigation and seamanship, and the additional knowledge and competence required to navigate in confined waters can be readily acquired with experience. However, since opportunities to acquire the necessary experience are generally infrequent, the best alternative is to accept the services of a pilot who has the necessary local competence.

The navigation of a vessel under the direction of a pilot demands teamwork. For his part, the pilot contributes general experience in handling vessels plus expertise in local navigation, while the Master or his representative, i.e., one of the mates, oversees the pilot's orders, provides him with particulars of the vessel, her manoeuvring performance and peculiarities, and offers advice as occasion demands (vide C. 2, pp. 26 to 29). Therefore, if the Master or mate possesses the required local knowledge for safe navigation in the waters concerned, it is unwise and unnecessary to compel the vessel to take a pilot whose services are not required and may not be used. Because the basic aim of pilotage legislation is to promote safety of navigation, it should never be distorted by being used as a means of either justifying an unnecessary number of pilots or exacting from shipping payment for services that are not required. Here again, the right of the State to deprive a person of part of his freedom can be justified only if a superior interest of the State is involved; otherwise, individual rights should remain inviolate.

Application of the foregoing principles requires a licensing procedure (with all the responsibilities the term connotes) in order to ascertain which Masters or mates possess the required local competence before they are exempted from pilotage and to ensure that their exemptions are withdrawn if there is any reason to doubt that they are no longer qualified. Furthermore, because each Pilotage Authority is responsible for licensing its pilots, it should perform this similar function for Masters and mates.

In Part VI C.S.A., the official document issued pursuant to such licensing is called "pilotage certificate". It is considered that the term is misleading and that it should be replaced by "personal exemption certificate" or other appropriate term (vide C. 8, p. 307).

However, personal pilotage exemptions can not be granted unless, and until, a system which makes full use of Pilotage Authorities' competence is devised and implemented. The past record has shown that, despite the basic injustice entailed in the denial of personal exemptions and the fact that in such exemptions lay the only legal solution to a number of their problems, Pilotage Authorities yielded to the pilots' objections and failed to make the necessary regulations, with the result that it was impossible to examine

applicants and issue pilotage certificates. Since 1934, the question of pilotage certificates as provided for in the Act has remained a dead letter because the legislation in this field was delegated to the regulation-making powers of Pilotage Authorities. This was most unrealistic, since it was to be expected that Pilotage Authorities would be reluctant to take action. The only solution is to deal with the question in the Act itself leaving little discretion to District Authorities. It is believed this could be achieved as suggested in Chapter 8, p. 307, i.e., by including in the Act all the general basic provisions and making it a statutory right to obtain a personal exemption certificate. Pilotage Authorities should be given the right to supplement the provisions of the Act through Regulations (vide Recommendation 19) by additional requirements they consider justified in their District. However, whether or not they take such action, the exercise of this licensing function would not be rendered impossible on this account as is now the case (vide C. 7, pp. 232 and 233). It is also necessary for the protection of the public and the efficiency of the pilotage service that such personal exemptions be obtained only by *bona fide* Masters and mates of specified vessels and that holders of exemption certificates remain competent, both generally and in local expertise.

Therefore, it is considered that personal pilotage exemptions should be provided for in the Act as follows:

- (a) The Act should stipulate that it is an absolute statutory right for any person who possesses the required competency and meets the prescribed conditions to obtain a personal pilotage exemption certificate.
- (b) Such certificates should be issued only to persons who are and continue to be *bona fide* Masters or mates of the complement of a vessel.
- (c) Candidates should possess a Canadian certificate of competency, or a special certificate of equivalence (as explained hereafter) not lower than Master home-trade or Master inland waters for the type of ship to which they belong, and the validity of the personal exemption should be conditional on the retention of such a certificate.
- (d) The validity of each personal exemption should be restricted to the vessel named on the certificate.
- (e) The certificate should be either valid for all District waters or restricted to a given route, depending upon the request made by the applicant and the extent to which the applicant is qualified.
- (f) Except for age limit, apprenticeship and basic certificate of competency, all other requirements (as modified from time to time by District Regulations) applicable to pilots' professional competency,

physical and moral fitness and reliability should apply *mutatis mutandis* to exemption holders, unless reduced prerequisites are specifically stipulated for them.

- (g) The Act should establish the minimum local experience required to obtain and retain an exemption certificate. Pilotage Authorities should be authorized to increase the prescribed minimum by District Regulation.
- (h) Licensing should be performed by the Pilotage Authority of the District concerned following the same procedure as exists for licensing pilots. Holders of exemption certificates should remain under the control and surveillance of the Pilotage Authority to the extent necessary to ensure that they remain qualified.
- (i) The Act should provide that personal exemption certificates remain valid as long as the various terms and conditions imposed by the Act and the regulations continue to be met, subject to review at all times.
- (j) All applicants should pay an examination fee and, in addition, the exemption certificate holder should be required to pay an annual certificate fee. Both charges should be defined in the Act.

A personal exemption must be restricted to a vessel named on the certificate in order to ensure that the exemption remains valid only as long as the holder is *bona fide* Master or mate of the vessel he navigates. A certificate valid for a class of vessels or for all, or a number of, vessels belonging to one owner would, in fact, be tantamount to creating another group of pilots in addition to the licensed pilots in a District, a situation which is neither intended nor warranted. However, the Act should provide for the situation when a personal exemption holder is appointed from one vessel to another. Once the Pilotage Authority is satisfied that the applicant is a member of the complement of the new ship in the capacity of Master or mate, it should be required to issue a new certificate, provided the circumstances (except the ship) remain the same.

A personal exemption holder should be obliged to substantiate his official capacity on board whenever requested by a Pilotage Authority or its duly authorized representative, observing that this fact is readily ascertainable from the vessel's articles.

Wherever the safety of navigation requires that compulsory pilotage be imposed, it is essential to make certain that those who benefit from a personal exemption meet the Canadian standard of competency for Master or mate of their vessel. This fact might be established by the Pilotage Authority at the time of licensing but, as recommended in the case of pilots (Recommendation No. 13), it is considered that such appraisal should remain the responsibility of the Minister of Transport. Therefore, applicants

holding a foreign certificate of competency should be required to obtain a special Canadian certificate valid only for the purpose of obtaining an exemption certificate. The Minister of Transport should be authorized by the Act to establish by regulations a list of Canadian equivalents of the various certificates of competency issued by other countries, when and to the extent they meet Canadian standards, in which case the procedure for issuing special Canadian certificates would merely amount to verification. For cases not so covered, applicants should be required to take an examination before the Department of Transport examiners of Masters and mates to qualify them for Canadian requirements.

The jurisdiction of the various courts under Part VIII should be extended to cover such special certificates of competency and, when warranted, these courts should have the power to order their cancellation or suspension, thus automatically invalidating the personal pilotage exemption (vide Recommendation 36). Similarly, the cancellation or suspension of a certificate of competency in a foreign country would automatically invalidate a special Canadian certificate and a personal exemption certificate issued on the basis of the foreign qualification.

The extent of local knowledge and experience should be determined by District Regulations to meet local needs but the requirements for obtaining and retaining a personal exemption should not exceed those prescribed for a pilot's licence or for navigating a vessel of the class named in the certificate. Where applicable, a restricted personal exemption certificate might be issued for a particular route. In this case, the examination on local knowledge should be limited to that route and its immediate surroundings and the certificate, when issued, should be restricted to the area in question. Otherwise, the certificate should be general and the examination on local knowledge should extend to the whole District, as for pilots.

Because experience is needed to acquire and maintain local competency, it is considered that the Act should establish a minimum standard leaving it to the Pilotage Authorities to increase it if considered necessary in the light of District peculiarities. It is suggested that a reasonable minimum for any District where pilotage is compulsory should be five round trips or ten one-way trips through District waters or on the particular route for which the exemption is requested during the two years preceding the application, it being understood that such trips were made with the Master and/or mate on the bridge accompanied by a licensed pilot or a holder of a personal exemption. To retain his exemption, any holder should be required to make a minimum of five one-way trips per year as Master or officer of the watch on the bridge. The exemption would automatically lapse if this minimum was not completed, subject, however, to renewal whenever the prescribed number was completed with a licensed pilot or a certificate holder, provided the Pilotage Authority was satisfied the former holder remained qualified.

The theoretical and practical examination on local knowledge should be carried out by the same board that examines pilot candidates in order to ensure uniform standards and maximum efficiency. Granting a personal exemption is, in fact, licensing and, therefore, imposes upon the Pilotage Authority the duty of surveillance as well as responsibility for reappraisal when necessary. In all respects (with due consideration for any incompatibility with their status as ship's officers) exemption holders should have the same privileges, rights, obligations, duties and responsibilities as pilots, and this should be stated in the Act.

With reference to fees, it is considered there should be an examination fee high enough (e.g. \$50) to discourage frivolous applicants but there should be no fees for a mere transfer nor when a holder whose certificate has lapsed because the minimum number of trips were not made seeks reissuance of his former certificate. It is reasonable that any individual for whose personal benefit these examinations are held should make a contribution to assist the District to meet the extra expenses incurred on his behalf. The circumstances surrounding these examinations should not be confused with those which prevail when pilot candidates are examined (vide C. 8, p. 260).

In addition, it is considered that a certificate fee should also be charged against the vessel on a yearly basis (e.g. \$100) as was previously the practice (vide secs. 469 and 470, 1927 C.S.A.). Since granting personal exemptions entails additional responsibilities (including surveillance and reappraisal) and administration for Pilotage Authorities, it is reasonable that these be borne by those who benefit and not be made a charge, through District general expenses and pilotage dues, against the vessels who make use of the services of pilots. In order to prevent abusive charges being imposed through regulations and the unnecessary disputes which may result, it is considered that the amount of both the examination fee and the annual certificate fee should be fixed in the Act itself.

In order to obviate unnecessary inconvenience where the safety of navigation is not involved, it is also considered that the recommended new Pilotage Act should dispense with examinations on local knowledge and skill for applicants who can prove that immediately prior to the entry into force of the new Act, or the imposition of compulsory pilotage, they have navigated ships as large as, or larger than, the one for which they are applying for exemption in the waters of the District, or the route concerned, without the assistance of a licensed pilot for at least ten one-way trips during the two previous years.

It is believed that the proposed system would provide the necessary guarantees. Whether or not appropriate regulations have been made, Masters and mates possessing the required general and local competency will always be able, even against the will or despite the possible inertia of Pilotage Authorities, to obtain and retain their personal exemption, if necessary with

the aid of a court order. If a Pilotage Authority makes regulations that prove to be discriminatory, abusive or intended to defeat the purpose of the Act, a number of appropriate remedies are available to any aggrieved party through the proposed regulation-making procedure by making use of the power of the Central Authority to act *proprio motu*, and in the case of ultra vires regulations, through a court order declaring their illegality. For relief against erroneous appraisal or reappraisal, an appeal should lie before the Admiralty Court (vide C.7, pp. 232 to 236 and C.8, pp. 305 to 307).

RECOMMENDATION No. 24

Where pilotage is classified as an essential public service, the status of licensed pilots to be that of Crown employees or quasi-employees of the Crown, the former being preferable

From the licensing point of view, the status of pilots is immaterial since the standards of qualifications required of pilots remain the same for a given area, whether or not the service is deemed to be an essential public service. The degree of expert knowledge required is determined by the local conditions that affect navigation, and licensing is always a prerequisite whatever the status of the pilots may be (vide Recommendation 12).

The situation, however, is totally different when the Crown's intervention is extended beyond licensing and the Pilotage Authority is required to control the provision of services (vide Recommendation 14). When such intervention is justified on the ground that the service is an essential public service, private considerations, whether of the pilots or of other interested parties, must yield to measures intended to promote efficiency and reliability.

As recommended in Recommendation 14, where a pilotage service is classified as an essential public service, the State's control must be complete. As far as the pilots are concerned, such control excludes free enterprise and the free exercise of their profession, and presupposes that they are employees or the equivalent (referred to in this study as quasi-employees or *de facto* employees).

In the context of the present factual situation, this is not a novel concept because, in fact, in all the main Districts the pilots are fully controlled and are all at least *de facto* employees of their respective Pilotage Authorities (vide C.4, pp. 74 and ff.).

The question is whether, in such a case, the pilots should be required to become actual employees or should be allowed to retain their *de facto* status. It is considered that the preferable status is employee. However, if the majority of the pilots desire to retain their status of *de facto* employees they should be allowed to do so. Although the status of quasi-employee involves a considerable increase in administrative problems, the pilots should be given

this option because this is the situation that now generally prevails and also because these administrative problems are not likely to affect the quality of the service.

The status of employee is ideal (vide C.6, pp. 140 and ff.) because when the provision of services to shipping is governed by considerations which override the private interests of both shipping and the pilots, their intervention in pilotage administration and organization must be limited to their direct concern and respective fields of interest which should be segregated as much as possible. As employees, the majority of the most pressing administrative problems that now exist would be solved, and any new problems created by the new status could be dealt with in a more orderly fashion.

If the pilots become Crown employees, they gain considerable benefits and enjoy security that no other status can provide. They are assured a definite remuneration because they have minimum guaranteed employment irrespective of the amount of work they actually perform. Any extra assignments they may be required to accept during peak periods mean higher additional pay. Their income is no longer affected by economic upheavals such as strikes by seamen, waterfront workers or industry, which in recent years have seriously affected the income of the St. Lawrence River pilots and, to an even greater extent, the remuneration of the British Columbia and New Westminster pilots. Moreover, they are protected against the consequences of a slow down in the economic activities of the region on which the harbour(s) they serve depend, such has been the case in the Sydney District during the last few years. Furthermore, this status makes the pilots eligible for the advantageous welfare privileges all Crown employees enjoy (vide Recommendation 39).

From the administrative point of view, the status of employee has the marked advantage of limiting the pilots' material interest in administration to their working conditions, the amount of their income and the manner in which they are paid, thus ending the standing problem which has proved the most serious source of contention between pilots and shipowners and, at times, even the Pilotage Authority. Continuing disputes are to be expected in a system where the pilots' remuneration consists of the net earnings of the District since these are directly dependent upon rates, operating expenses and the way the provision of services is organized in the District.

It is a matter of record that shipping has very few complaints about the quality of the service and the competence of the pilots. What few shortcomings there are can easily be remedied by reform at the Pilotage Authority level, mainly as recommended in Recommendations 26 to 38. The numerous disputes during recent years have all been of the same nature because they resulted from repeated efforts by the pilots to improve their financial and working conditions against the vigorous opposition of the shipowners who,

more often than not, objected only as a matter of principle. The narrowly avoided strike of the Quebec pilots in 1960 and the 1962 strike of the St. Lawrence River pilots, which the Saint John and British Columbia pilots threatened to join, are self-evident examples of this state of affairs; clashes were frequent and were carried even to the extent of magnifying petty details into major issues, e.g., whether the strength of the Quebec pilots should be slightly increased, or whether such a minimal item of revenue as the detention charge should be increased or redefined.

On the other hand, the pilots successfully opposed administrative measures that would have resulted in loss of revenue or in increased operational expenses and smaller net earnings. For instance, pilotage certificates are not issued because the pilots believe they would cause a loss of income; in most Districts the dues that are paid as a result of the compulsory payment system are credited at the pilots' request to the pilots' earnings, contrary to the specific provisions in the Act regarding the application of funds; the British Columbia pilots have always objected to stationing pilots in the northern region because they would contribute less to the pool. Again, the Quebec pilots do not perform port pilotage in Rimouski and in the other small ports situated east of Les Escoumains but allow unlicensed pilots to provide the service (although the area is still within the limits of the Quebec District) because such assignments are not financially attractive.

However, it should be realized that pilots who are Crown employees do not fit into any existing category of civil servants but are in a special situation which must be treated on an *ad hoc* basis. Failure to recognize their special situation will cause unending trouble, contention and dissatisfaction and may, in fact, defeat the intent of the new legislation and render the status of employee unacceptable. There is no reason why this should be but it will be the case if a realistic view is not taken and if attempts are made to standardize by forcing the pilots to fall into already existing cadres. A completely new classification of Crown employees must be created whose working conditions and terms of employment are determined by the nature and circumstances of their service, i.e., local circumstances and the needs of each District; this classification must have flexibility within itself, e.g., to mention only one point, it is unrealistic not to consider pilots' employment on a yearly basis simply because pilotage is not performed during the winter months; it is illogical to consider for any purpose that the pilots are engaged in a part-time profession, because the facts prove the opposite. In a pilotage organization where serious efforts are made to improve the pilots' qualifications, the winter months, aside from being the period for annual leave, should be employed to provide pilots with special courses and training and could be used to perform any indicated routine medical examinations or examinations on professional competency, if or when required.

As stated above, when the majority of the pilots in a District desire to retain their status as *de facto* employees, they should be allowed to do so,

provided any conflict of interests is not prejudicial to the superior interest of the public. Nevertheless, the control of the Authority must be complete, i.e., in addition to being in charge of despatching, it should also pool the pilots' earnings, as is now done by the Pilotage Authorities of all Districts where the pilots are despatched by the Pilotage Authority, except, as seen earlier, in the three St. Lawrence River Districts where this privilege was denied to them, forcing them to create and operate their own pooling system (vide Cs. 4 and 5). Control of pooling is required, *inter alia*, to make despatching more equitable by regulating the pilots' remuneration according to availability for duty rather than work performed. Experience has shown that, despite the complicated rules elaborated in the St. Lawrence Districts, pilotage assignments and workload can never be shared equally. An additional advantage of such control is that duplication of administration is avoided as occurs when dues are handled by two separate authorities, e.g., the pilots in the St. Lawrence Districts are thus obliged to bear considerably more administrative expenses than their fellow pilots in the other Districts.

Where pilotage is not classified as an essential public service, the pilots may be given any one of several possible forms of status, such as self-employed, members of a pilots' partnership, employees of a third party or of a pilots' organization, *de facto* employees, or employees of the Pilotage Authority. The Central Authority should make this decision through Pilotage Orders when it determines the extent and nature of control to be imposed on a given service and what status is indicated in the particular circumstances of each case (vide Recommendation 14).

It is considered that there should be a cardinal rule that only one status is permissible for pilots performing a given service, in other words, if there is only one service in a District, all the pilots in that District should have the same status, but if more than one pilotage service is provided in a District, each by a separate group of pilots, it is not necessary, but highly desirable even then, that all the pilots belonging to different groups in the same District should have the same status. A fair example of what may happen is the situation that has developed in Great Lakes Districts 2 and 3 where pilotage services are provided under one authority in each District by two groups of pilots with different status (vide Report, Part V). It is worth noting that the joint international pilotage operations shared by the Netherlands and Belgium in the Ghent Canal and on the Scheldt River, which have been in operation for over 125 years, are based on identity of organization and pilots' status in both countries (vide Appendix XIII).

It is considered that, in order to dispel any ambiguity and to establish legal rights (vide C.4, p. 82), the status of quasi-employee (or *de facto* employee) should be clearly defined in the Act. This definition should indicate that the terms and conditions of employment of such employees are defined *in toto* by legislation, that there is no civil contract of employment

between them and the Pilotage Authority and that their remuneration is normally governed by the amount of earnings they make individually or the aggregate earnings of the group.

As a result of the clarification of this status some adjustments will have to be made; for instance, care should be taken that all operational expenses incurred by pilots are reimbursed to them because otherwise these will not be allowed as permissible deductions for such purposes as income tax. This will also remedy the discrimination that otherwise results because the actual amount of these expenses varies between pilots. Pilots with a *de facto* status should not be required to assume expenses that Crown employee pilots are not required to pay.

RECOMMENDATION No. 25

**All pilots in a District, or each distinct group of pilots within
a District, to be a statutory corporate body**

As demonstrated in Chapter 4 (pp. 82 and ff.), where the exercise of the pilot's profession is no longer performed on an individual competitive basis but is controlled by a superior authority, there must be an organization to represent the pilots as a group in order to defend and promote their interests. To be truly representative, total enrolment is necessary. A multiplicity of organizations should not be permitted to exist, especially where the service is essential in the public interest, because their conflicting views and aims will inevitably lead to dissension to the grave prejudice of the efficiency of the pilotage service. To be realistic and effective, such an organization should be provided with statutory powers to ensure that it plays the rôle for which it is created.

Before attempting to define the powers of such an organization, it is necessary to appreciate fully its nature and purpose. Professional organizations in general may be divided into two groups: professional licensing bodies and trade unions. For certain professions and trades over which, in the interest of the public, a certain amount of State control must be imposed, the legislature has delegated to corporations it has created for that purpose, composed of members of the profession or the trade concerned, the task of exercising such control on behalf of the State. As a rule, the powers and responsibilities of these organizations consist primarily of licensing to ensure a high standard of qualifications of the members of the profession, the establishment of tariffs of professional fees within the framework of the liberal practice of the profession or trade, and also the power and duty to impose disciplinary sanctions to the extent the exercise of these powers is required for the protection of the public. These professional corporations partake of the functions of the State and form an integral part of public administration. Their sole preoccupation is to protect public interests.

The purpose of the second type of professional organization is to defend and promote the profession or trade concerned, i.e., the collective, professional and economic interests of the group. Such an organization becomes necessary whenever the exercise of professional activities assumes a collective character. While, in their own interest, these organizations tend to improve the quality of the services rendered by their members, they are principally organizations whose purpose and mandate are to negotiate with employers, or other controlling authorities, the working conditions of their members as well as their remuneration, normally for the purpose of reaching an agreement which will be binding on all parties, including its members.

It is clear that the two types of organizations are incompatible since the first is of a public character acting in the public interest while the second exists to promote and defend private interest. Any organization which attempted to assume both rôles would find itself in a perpetual conflict of interests.

The local nature of pilotage, necessitating different methods of operating the service in various Districts, as well as the particular importance of pilotage to the State, have doubtless been the reasons why Parliament has retained licensing control, entrusting that function to Crown entities created for the purpose, i.e., Pilotage Authorities. It was also logical that any additional control required in the national interest over the organization and direction of the service should also be exercised by Pilotage Authorities (vide Recommendation 14).

The requirement is for the second type of pilots' organization, i.e., one whose prime purpose is to promote and defend the private interests of the pilots of a District as a group; corporate status for this pilots' organization is also indicated. There appears to be no objection to entrusting also to this corporate organization limited powers of control over the freedom of its members to practise their profession, provided there is no danger of conflict between the interests of the pilots and the superior interests of the public. But under no circumstances should such an organization be assigned any of the essential functions that pertain to the Pilotage Authority.

Therefore, it is considered that the Act should stipulate that the pilots of each District as a group, whatever their status may be, Crown employees or otherwise, are a corporate body, and, if more than one homogeneous and distinct group of pilots exists in a District including attached areas (vide Recommendations 8 and 10), each group forms a separate corporate body, e.g., the Montreal District has river pilots and harbour pilots, each with its own interests which may often be in conflict.

The same rule should apply to a merger type District which, by definition, is a grouping of separate, unconnected pilotage services, each provided by its pilot or pilots. However, it is considered that this rule should

not automatically apply unless there are at least five pilots in a group. If the Central Authority considers that there would be an advantage in granting a corporate status to a group of less than five pilots, or to group in one corporation the pilots of all the various groups in a merger type District, it should have the power to do so through Pilotage orders.

The Act should also provide for the dissolution, division or merger of these corporations which would automatically follow the abrogation or division of a District, or the merger of Districts or of the services within a District.

The Act should provide for the following original powers to belong automatically to such a corporation:

- (a) to be the official representative of its members in matters of common group interest, mainly *vis-à-vis* its Pilotage Authority but also the Central Authority, the Pilotage Regulations Appeal Board, government authorities, shipping interests and any public or private bodies or persons, with particular emphasis on the working conditions of the pilots, their remuneration and other matters affecting their income and welfare;
- (b) to promote the pilots' common interests, to conduct studies and research, and to foster educational and training programmes designed to raise the standard of professional qualifications of its members;
- (c) to advise the Pilotage Authority, when required, on technical matters in the field of pilotage and also to bring to its attention any matter that might be of interest in this field, without implying, however, that the Pilotage Authority would not have the right to seek the advice or opinion of any other expert, or any pilot in particular, at its sole discretion;
- (d) to designate the pilot or pilots who are to sit as pilot member(s) on boards or to act as assessor(s) when legislation requires that they be appointed by the pilots;
- (e) except where the pilots' status is that of Crown employees, to organize or arrange for health, welfare and insurance protection in the common interest of the group, with mandatory participation when imposed through District Regulations (vide Recommendation 39);
- (f) to hire the necessary professional or clerical help and to own the assets required for the discharge of its corporate responsibilities;
- (g) to raise finances through membership dues fixed at a general meeting of the corporation by special resolution adopted by a substantial majority stipulated in the Act, e.g., a two thirds majority of the members with the statutory right to have these

corporation dues deducted at source automatically either from the pilots' salary, the pilotage dues or the share of the pool belonging to its members as the case may be;

- (h) to make by-laws governing its internal organization, carrying penal sanctions, when required, in the form of a fine, or preferably a penalty (but in no case should the corporation have the power to act as a tribunal); such fines or penalties to be credited to the Pilotage Equalization Trust Fund as recommended in Recommendation 21.

All the pilots in a group should automatically be members of the corporation, and a pilot's licence should grant automatic membership. If a pilot's licence is suspended, he retains his membership but automatically loses it if his licence is cancelled.

Furthermore, the Act should cover the question of the ownership of the corporation's assets in order to prevent a recurrence of the unfortunate situation which developed after the creation of the 1860 Quebec Pilots Corporation. Because the special Act which created that corporation did not cover the matter, the pilots acted as if the corporate assets were jointly owned in equal shares by all the pilots on strength and the corporation only had the use of them. Therefore, it developed that no pilot, irrespective of his competence, could be appointed pilot by the Pilotage Authority unless he had the financial means and the opportunity to buy a share of the joint assets. It is charged that this resulted in nepotism in that the pilots reserved their shares for relatives and friends. When the corporation was forced to abandon most of its activities in 1922, the assets were sold and the proceeds distributed among the pilots then on strength although the corporation continues to exist and is still operating (vide Report, Part IV, Quebec District, *History of Legislation*). Therefore, the Act should stipulate that such statutory corporations are non-profit organizations and should provide for the disposal of their assets in case of dissolution. It is suggested that one possible solution is as follows: because a corporation normally ceases to exist *ipso facto* on the dissolution of the District or when the number of members drops below five (unless it is kept in being by an appropriate Pilotage Order), it is considered that the Act should provide for its survival for a given period, e.g., 30 days, for the sole purpose of disposing of assets. These assets should be distributed as directed by the members to similar statutory pilot corporations but, if the members fail to do so in the given period of grace, distribution should be effected by the Central Authority.

Because of their nature, these corporations should not have the power to discipline their members. Since this power would necessarily have to be restricted to breaches of provisions aimed at promoting the private interests of the group, it would be inconsistent to make the most interested parties,

i.e., the pilots themselves, members of a disciplinary tribunal. It follows that because such corporations are necessarily deprived of the right to expel members, a penal sanction must be provided for any breach of a corporation's valid by-laws. It is considered that the best solution is either to provide for a fine, or preferably a penalty, and to require that any breach of a corporation's by-laws which carries a penal sanction be prosecuted by the corporation before the regular courts.

The corporation should have the power to represent a pilot and to act in any circumstances as spokesman for an individual pilot, always subject to the pilot's consent. Observing that a pilot may have personal interests opposed to those of the group, he should never be deprived of his privilege to protect his own rights but, equally, the corporation should be empowered to intervene and to oppose or promote the pilot's action if the interest of the group is involved. At the same time, a Pilotage Authority should always have the power to deal with a pilot directly.

The Act should also deal with the question of general meetings. The nature of the pilotage service precludes the advisability of holding a general meeting which all members are required to attend (unless it is possible to schedule it after the navigation season closes) because complete attendance amounts to a stoppage of work. Therefore, the Act should state that pilots who are prevented from attending on account of their pilotage duties may be represented by proxy, provided a sufficient number of members attend in person. It is considered that an adequate quorum would be 40 per cent of the members.

The Act should also provide for a minimum system of control over the corporations' activities so that any irregularity, abuse or discrimination can be either prevented or corrected without encroaching on their autonomy. In this regard the following provisions appear desirable:

- (a) Corporation by-laws (vide p. 552, subpara. (h) of this Recommendation) should be subject to the approval of the District Pilotage Authority. The Pilotage Authority should have no power to modify proposed by-laws and it should be provided that by-laws automatically become effective unless they are disapproved within a given period (e.g., 30 days) after their transmission for its approval. The only reason for refusing approval should be that the proposals are inconsistent with the pilotage legislation governing the District or are *ultra vires*. The Pilotage Authority should also have the power to cancel at any time any by-law provision as amended from time to time; a disapproving decision or an order cancelling a by-law provision should be in writing and the grounds on which it is based should be stated. In all such cases, the pilots' corporation should have a right of appeal to the Central Authority.

- (b) Each corporation should be required to submit to its members, with a copy to the Pilotage Authority, a financial statement of its own corporate financial activities within a prescribed period of time after the end of the calendar year, and at any other time when requested by the Pilotage Authority. The Pilotage Authority should have the power to have the statement audited by a designated person, the cost being shown as an operating expense of the District.

Subject to Recommendation 14 (to which specific reference is made), it is considered that the Act should provide for the possibility of these statutory corporations participating in the provision of pilotage services. As long as this mandate is accepted by the majority of the pilots in the corporation, the Central Authority should be authorized to make Pilotage Orders granting to such corporations any or all of the following operational powers:

- (a) to establish and administer the pooling and sharing of the pilotage earnings of its members and, for this purpose, to take charge of the collection of pilotage earnings unless the Central Authority wishes to reserve this function to the local Pilotage Authority;
- (b) to direct and manage the provision of pilotage services by its members;
- (c) to operate pilot vessel services and other transportation services that are required by its members in the course of their duties.

If a pilots' corporation exercises any of these functions it would do so under the authority of the Crown, from which it would draw its authority and to which it would be answerable for its mandate. The mandate should be conferred by a Pilotage Order but the necessary rules of operation should be contained in District Regulations. The procedure laid down in Recommendation 19 should apply, with the additional requirement that, before these regulations can be approved by the Central Authority, they must first be accepted by the majority of the pilots (and not by a decision of the Board of Directors of the corporation); the preamble to the District Regulations should indicate that this requirement has been complied with.

The corporation should be required to account for its mandate both to its Pilotage Authority and to its members. First, it should be required to produce annually, within 30 days after the close of the calendar year, a detailed financial statement of its special operations and should provide at any other times any other financial return or information that the Pilotage Authority may require; in addition, it should be obliged at any time to have its financial operations audited by the Auditor General of Canada or by any other person appointed for that purpose by the Pilotage Authority.

As recommended in Recommendation 17, if irregularities are suspected, the Central Authority should have the authority, to be exercised by Pilotage Orders, to deprive the pilots' corporation of these special powers and to appoint a trustee to exercise them while the matter is being investigated and appropriate remedial action taken.

Because a pilots' corporation exercises any of these functions on behalf of a Pilotage Authority, any costs incurred should be considered District expenses to be met out of pilotage revenues. Therefore, the prior approval of the Central Authority is necessary, just as if they were incurred by the Pilotage Authority itself, as recommended in Recommendation 20. Whatever assets are required for these purposes should belong neither to the corporation nor to the pilots in joint ownership, but to the Pilotage Authority, to be used, administered and maintained by the pilots' corporation as long as its mandate lasts. In case these special powers are withdrawn, its rights to the possession of these assets are automatically transferred to the Pilotage Authority. If the District is abrogated, these assets should be liquidated and the proceeds handed over to the Pilotage Equalization Trust Fund. This procedure will end the argument that is always put forward whenever such an auxiliary service is taken over by the Pilotage Authority (vide C. 5, pp. 113-115, C. 8, p. 320). It could not be argued that these assets have been acquired and maintained with money that belonged to the pilots. In fact, it would have been paid by shipping because the disbursements that were required as part of the authorized operational cost of the District would have been taken into consideration when the tariff was fixed so that ensuing dues would yield sufficient revenues to meet both the District operating expenses and the aggregate amount required to meet the pilots' salaries or, in the other eventuality, their target income.

If the corporation is authorized to pool the pilots' earnings, the District Regulations should list the various deductions the pilots' corporation, as trustee for the pool fund, is authorized to effect and should also establish the rules that govern sharing. In this regard, reference is made to C. 6, pp. 192 to 194 and Recommendation 39. The cost of operating the pool should not be a charge against the corporation's own revenue, i.e., it should not be met out of corporate dues but should form part of the operating expenses of the District just like any other expense arising from the exercise of these operational powers. Conversely, the corporation's own activities should be financed only from corporate dues, and never through the pool or through earnings derived from the operation of an auxiliary service.

While statutory corporations of pilots at District level are indicated, it is considered that a national federation of these corporations should not be imposed by statute. Such a federation has never existed in Canada because there has been no need for it. Any artificial need that may have been created on a regional basis when several Districts were given the same Pilotage Authority in the person of the Minister of Transport will disappear if the

Recommendations of the Commission are implemented and pilotage administration is effectively decentralized. In that event, all matters of District organization and administration will either be settled, or at least debated, in the District area, since the Central Authority is required to hold its public hearings in the locality concerned. Furthermore, because the various Pilotage Districts in Canada are located so far apart, the operational cost of such a federation would be considerable and, in the present context, it does not appear justifiable that such a financial burden be imposed by statute on Canadian pilots.

RECOMMENDATION NO. 26

Increased statutory surveillance and reappraisal powers to be granted to the District Pilotage Authority

The Commission's study of the evidence indicates that pilotage is an essential public service in Canada and, in certain areas, even vital to our national economy. Reference is made to the preamble of Chapter 9 which states that the value of pilotage as a safety factor is in direct relation to the qualifications and competency of each pilot. Pilotage Authorities bear the responsibility for ensuring that adequate standards are provided and maintained.

A Pilotage Authority's responsibilities increase considerably when it is required to administer and provide a pilotage service. It is then no longer the licensing authority of a free profession but the authority responsible for maintaining an efficient, adequate and reliable service. As shown in Chapter 9, the limited surveillance and reappraisal powers now possessed by Pilotage Authorities under Part VI of the Act are so lamentably inadequate that correction is urgently required. (Re meaning of the term "reappraisal" see C. 9, p. 352.)

Increased surveillance and reappraisal powers are also required because the state is committed to considerable pecuniary liability when it provides pilotage services. In a system where the Crown merely licenses pilots, it has few obligations but when, through its officers and servants, it also takes responsibility for administering the service and assigning pilots, it may be required to assume liability for damages caused by pilots when piloting, either because the Pilotage Authority, or one of its representatives, assigns an unfit pilot or through the principle of law that a master is responsible for the wrongdoing of his employee when acting within the scope of his duties. The latter is the case when the pilots are Crown employees and possibly also when, to all intents and purposes, they are *de facto* — if not *de jure* — employees of the Authority. Hence the necessity for effective means of

surveillance to prevent the assignment of a pilot who is unfit, and for adequate reappraisal powers to avoid retaining incompetent or unreliable pilots.

Since damages resulting from a maritime casualty are frequently extensive, one solution might be for Parliament to limit or deny Crown liability for the wrongdoing of pilots by statutory provisions. However, for many years, Parliament has adopted the principle that the Crown is liable for the wrongdoing of its servants when on duty. In the field of pilotage, the Government has already assumed this risk in certain areas by employing pilots to provide pilotage services, i.e., at Goose Bay, in Great Lakes Districts No. 2 and No. 3 and, since 1966, in the Sydney Pilotage District. The Commission approves this approach but considers the risk of liability should be minimized by all reasonable means, *inter alia*, by providing those in charge of the service with sufficient control to enable them to vouch for the pilots they assign to ships.

Although there is no legal objection if some of these powers are concurrently exercised by other Authorities, it is considered most important to grant each Pilotage Authority full and undivided power to ensure freedom of action. The situation provided for in the present Canada Shipping Act was not contemplated when pilotage legislation was originally drafted but was brought about by subsequent amendments which, in their enactment, created conflict with the autonomy of District Pilotage Authorities on which existing legislation is based.

These powers must be statutory, whatever the status of pilots and the nature of the legal relationship between each Authority and its pilots may be (vide C. 8, pp. 291 and ff.), first, because some powers are extraordinary (e.g., power to compel witnesses) and can not be granted other than by statute; second, because a system based on licensing offers no alternative, since licensing is a method of control established by legislation, and any power or right a licensing authority may possess must be founded on a provision in applicable legislation. In an organization where pilots are Crown employees, ordinarily the rights and powers over them can be derived from the contract of hire, the terms of a contract being the law of the parties. But when public interest is involved, it is the duty of the responsible legislature, in this instance the Parliament of Canada, to intervene by defining by statute those aspects of the contract which can not be left to the hazards of negotiations and private agreements. Public interest transcends the immediate interests of the parties involved in pilotage, and matters which directly affect the superior interests of the country must be dealt with in legislation. These include the minimum standard of qualifications that pilots of a given locality must possess to ensure an adequate, reliable pilotage service, and the powers and means to ascertain that, after pilots receive their licence, they remain trustworthy experts in the navigation of their District waters and that only fit, competent pilots are assigned to duty.

Since powers of surveillance and reappraisal are relative, care should be taken to define them in new legislation so that they apply to every possible status pilots may have *vis-à-vis* their Pilotage Authority, e.g., the aim of reappraisal is to prevent a pilot who has become a safety risk from piloting. In a District where the pilots are Crown employees, if licences have not been issued to them, the expression "withdrawal of the licence" would then mean "dismissal from the service", and "suspension of the licence" would mean "suspension from duty". This difficulty would not arise if, as recommended earlier (vide Recommendation 12), licences were issued in all cases and a licence was a prerequisite to employment.

The foregoing remarks and the following recommendations apply, *mutatis mutandis*, to all categories of persons to whom the Pilotage Authority may be authorized in future legislation to issue licences, certificates or equivalent documents even when no specific reference is made to them.

RECOMMENDATION No. 27

Legislation to establish special methods of keeping Pilotage Authorities informed of the competence, fitness and reliability of pilots

Pilotage Authorities can not discharge their reappraisal responsibilities properly unless they are alerted to every situation or occurrence that may indicate lack of qualifications on the part of pilots.

The present Canada Shipping Act provides no special means of information for Pilotage Authorities. This omission was consistent with the limited rôle they were originally assigned but the situation has changed and, as seen in Chapter 9 (p. 331 and ff., and p. 336 and ff.), Pilotage Authorities have tried to provide themselves with sources of information by their regulations, most of which are of doubtful validity and, at times, are clearly *ultra vires* for lack of supporting authority in the statute.

In a field where safety of navigation is directly concerned, it is essential that every reasonable means be taken before casualties occur to detect any deficiencies in pilots that may make them safety risks. All those connected with the pilotage service who are in a position to furnish pertinent information should be obliged to report any situation or occurrence they witnessed concerning the competency, fitness or reliability of pilots. Such extraordinary provisions should not be extended to reporting disciplinary cases unless the offence committed is one of the serious offences listed in legislation as giving rise to reappraisal of the offender's reliability.

These obligations should be specified in legislation. Those of general application should be stipulated in the Act itself; the others should be made subject matters of regulations. To be capable of enforcement, these impera-

tive provisions should carry a punitive sanction. Normally, non-compliance should be an offence carrying a fine; for instance, it should be made a statutory offence:

- (a) for the person in charge of a pilot vessel, or for an officer or employee of a Pilotage Authority, not to report a pilot proceeding on duty or liable to be called for duty who, for any reason, appears to be unfit to pilot;
- (b) for a pilot whose vessel was involved in a shipping casualty or in an incident affecting navigation, not to report the matter to the Pilotage Authority or its local representative immediately by the quickest available means (i.e., radiotelephone, wireless or land telephone) to be confirmed in writing as soon as possible thereafter;
- (c) for a pilot to fail to report before proceeding on duty any impairment he may suffer whether of a temporary or permanent nature that might render him unfit to perform pilotage duties.

Because it is essential for shipping to co-operate by reporting all instances where a pilot has appeared unfit or incompetent, the Act should require, as suggested in Chapter 9 (pp. 331-332) for:

- (a) the Master of a ship to report any such instance immediately upon discovery by radiotelephone, wireless or land telephone to the Pilotage Authority through the pilotage office and by further reporting the matter in writing on the pilot's source form;
- (b) source forms to provide a space for the Master's written report.

As a means of enforcement, the Act should decree for failure on the part of the Master to comply, the loss on the part of the ship of any claim or defence in civil litigation with the pilot, the Authority, or the Crown, based on the pilot's alleged impairment.

RECOMMENDATION No. 28

Pilotage Authorities to possess full powers of investigation to conduct administrative inquiries within their reappraisal jurisdiction and responsibility for the safety of navigation

When a suspicion arises concerning the adequacy of a pilot's or other licensee's qualifications or competency or when a shipping casualty occurs in a compulsory pilotage area, even if no pilot is involved (Recommendation 22), the Pilotage Authority should possess full powers of investigation to carry out, or to have carried out on its behalf, administrative inquiries, in view of the superior interests involved.

There is no objection if an administrative investigation takes the form of a formal Court of Inquiry with the publicity usually given to the proceedings of courts of justice if the Pilotage Authority so decides, but as a rule such fact-finding exploratory investigations should be held informally without publicity. The investigator should make use of his special powers of investigation only occasionally, for instance, when it is deemed preferable to have certain testimonies taken under oath, or if co-operation is withheld, e.g., the necessary information is not volunteered, or access to premises or to ships is not allowed.

The Act should specifically provide for two types of exploratory investigations; first, the inquiry to gather evidence, i.e., testimony and documents; second, the appraisal of a situation, i.e., an examination or survey. The special investigatory powers required are those granted by sec. 556 C.S.A. to an investigating officer holding a Preliminary Inquiry under Part VIII of the Act, plus the power to require a pilot to submit to examination by experts, both in the field of his professional qualifications and also of his physical and mental fitness. For instance, in an alleged case of impairment due to alcohol or drugs, the pilot concerned must submit immediately to a medical examination and to any test that the physician may require.

To avoid unnecessary argument and for the purpose of Pilotage Authorities' administrative inquiries, as well as for their reappraisal function, it is recommended that provision be made in the Act to compel pilots as witnesses, but that any statement they may be compelled to make may not be used against them at a penal trial (except in a case of perjury). It is the responsibility of each pilot to maintain his qualifications and competency and, whenever such an investigation is required by legislation or whenever a suspicion arises, it is his duty to extend full co-operation during the investigation.

As a means of enforcing these powers of investigation, the Act should:

- (a) define as statutory offences all cases of non-compliance with lawful orders given pursuant to the exercise of these special powers of investigation, including:
 - (i) failure to comply with a summons to appear;
 - (ii) refusal to give evidence as required, whether or not under oath, wilfully giving false information, or omitting to give full information;
 - (iii) failure to submit to an examination as to competency, or to a medical examination and tests;
 - (iv) withholding permission to board or inspect a vessel;
- (b) provide that any such offence committed by a pilot becomes a case for reappraisal;
- (c) enact that refusal on the part of a Master, when duly required for the purpose of the investigation, to allow the investigating officer

to board his vessel or the person so charged by the Authority to inspect it, also renders the vessel liable to arrest until the order is complied with.

The use of these special powers of preliminary investigation should be limited to cases within the Pilotage Authority's reappraisal jurisdiction and to shipping casualties in compulsory pilotage areas. They should not be extended to the pre-trial investigation of a suspected pilotage offence unless the offence comes under the Authority's reappraisal jurisdiction. Since these powers are exceptional, their use should be restricted to cases which directly involve public interest and the safety of navigation, excluding, for instance, incidents of a minor disciplinary nature.

The Act should also provide for automatic, compulsory examinations of pilots to be held as provided in the Act, or in regulations the Pilotage Authority should be authorized to make, in fields where it is expected that competence and qualifications may deteriorate with the passage of time:

- (a) periodical eyesight and hearing test;
- (b) periodical physical examination, e.g., every five years after reaching 40 years of age and every year after reaching 65 years of age;
- (c) examination of professional competency before a pilot returns to duty after an extended period of absence, e.g., over six months;
- (d) periodical examination of professional competence in fields where knowledge is liable to deteriorate due to lack of practice or by not being au fait with current local knowledge and methods, e.g., the use of communications, radar, and other electronic and shipborne navigational devices and possible new practices in the berthing and unberthing of vessels in difficult waters.

Such administrative investigations should be held with the least possible delay: first, in order not to cause any unnecessary hardship to the pilot if he is under preventive suspension; second, in certain cases, to obtain the testimony of witnesses on board vessels which are expected to make an early departure from Canadian waters.

The Act should allow considerable flexibility in the conduct of the investigation. The inquiry should normally be carried out by one man, but it should be possible for any number of investigators and experts to be employed at the same time to cover different aspects within the District and elsewhere.

To avoid abuses of these extraordinary powers and as proof of the investigator's appointment and powers, the Act should:

- (a) require that, unless the investigation is carried out by the Pilotage Authority itself, the investigator or expert be supplied with a written appointment issued on a case basis which specifies that he is vested with all the investigatory powers provided by the Act (a

telegram emanating from the Pilotage Authority or its duly authorized representative may be considered sufficient written authority;

- (b) set out the forms of summons and orders that may be issued by the investigator or expert, provided that in cases of urgency the order may take any form, and when the person to whom the order is intended is present, a verbal order after the investigator or expert has shown his appointment is sufficient.

With a little planning, a Pilotage Authority should be able to obtain quickly any required information from anywhere in Canada. Pilotage Authorities should give assistance to one another by placing their investigators at the disposal of the others. Within its District, each Pilotage Authority should arrange to have available in the vicinity of each boarding station persons who, in case of urgency, could be contacted by telephone or telegraph and be required to carry out immediately all or part of an investigation, e.g., to take the testimony of witnesses on board a vessel about to pass the boarding station. Arrangements should be made for the services of a physician residing in the vicinity of every boarding station to be available to verify without delay the condition of a pilot reported to be under the influence of alcohol or drugs, or to be physically impaired for any reason when on duty or about to proceed on duty.

In order to deal with the special situation created by the fact that vessels to which pilotage service is provided are likely to leave Canadian waters before the necessary remedial process is completed, the Act should provide for a procedure whereby testimony obtained at such inquiries is admissible during the reappraisal process even without the pilot's consent, if the witness can not be compelled to attend, e.g., when he has left Canada and is not expected to return within a reasonable period of time. The Act should require that such testimony be given under oath and in the presence of the pilot concerned unless the pilot, having been given reasonable opportunity to be present, failed to appear. The pilot, if present, should be given full opportunity to cross-examine witnesses. In such a case, the pilot should also be given the opportunity to obtain in a similar way the evidence of other witnesses whose presence is not likely to be obtained later. Unless these witnesses can be made available, these testimonies are admissible evidence at the reappraisal, but not at the prosecution of any pilotage offences.

As a consequence of the power to summon witnesses (whether for an administrative investigation or for reappraisal), the Act should give witnesses the right to be paid travelling and living expenses arising from such attendance, plus compensation comparable to that being paid by the civil courts of the locality, unless a higher amount is fixed by regulations. Such expenses should automatically become part of the District's operating expenses, unless these costs, when incurred during reappraisal, are awarded against the pilot concerned and recovered from him.

RECOMMENDATION No. 29

The Act to affirm the right, and make it an obligation, not to despatch when unfitness is suspected, and give the Pilotage Authority the right to impose preventive suspension when reappraisal has been, or is about to be, initiated

In view of the responsibility and consequences despatching entails, the Act should contain a provision stating that, notwithstanding any rules or regulations regarding despatching, the Pilotage Authority and/or its officers or employees have the right not to assign a pilot whenever they have reason to suspect that he is not fit for duty at the moment of despatching (vide C. 9, pp. 345 and 347).

As a corollary, the Act should make it a statutory offence for a person actually charged with despatching duties to assign a pilot who, for any reason, does not appear fit to pilot at the time.

When a pilot is not despatched on that account and taken off the tour de rôle, the Authority should proceed immediately to examine the suspicion and take the indicated administrative action. If the cause is not self-evident, an administrative investigation should be carried out immediately; in most cases this would take the form of a medical examination. When the cause has been ascertained, at least *prima facie*, the Pilotage Authority, or its representative duly authorized for that purpose, should take the indicated administrative decision, e.g., if the cause is merely an illness of a temporary nature, the pilot should be kept off the tour de rôle until he has fully recovered; if, on the other hand, the despatcher's suspicion is dispelled (with or without administrative investigation), the pilot's name should be reinstated on the roster without delay; if, however, the factual situation indicates a case that falls within the reappraisal jurisdiction of the Authority, the reappraisal process should be initiated forthwith.

When reappraisal is initiated, it should always be accompanied by the imposition of a preventive suspension. (Re meaning of "preventive suspension", vide C. 9, p. 343.) Reappraisal is undertaken because a Pilotage Authority has reason to believe that a pilot has become a safety risk by endangering navigation. In such circumstances, the Authority would be derelict in the discharge of its responsibilities if it allowed such a pilot to continue to perform pilotage duties.

A similar course of action should be taken whenever a Pilotage Authority acquires information indicating a pilot's unfitness.

The Act should define those situations which would automatically cause preventive suspension. These would include:

- (a) an unfavourable result from a compulsory exploratory examination;
- (b) the alleged commission of an offence giving reappraisal jurisdiction.

A shipping casualty should be defined as an occurrence which raises a suspicion of unfitness. The pilot or pilots involved should be kept off the list until the Authority is reasonably satisfied that the casualty was not due to the wilful act, gross negligence, incompetence, or physical unfitness of the pilot(s); in other words, reappraisal would not be necessary. However, if the Pilotage Authority is not satisfied, the same process described earlier should apply—starting with the administrative investigation, if necessary, followed, when indicated, by the reappraisal process.

While removal from the *tour de rôle* and preventive suspension are measures imposed for the protection of the public, care should be taken to ensure that the pilot involved suffers as little inconvenience as possible. Although these measures may be considered occupational hazards of the pilot's profession, all cases involving them should be heard with the utmost celerity. To mitigate inconvenience to the pilots, the Act should provide that, in Districts where the pilots' earnings are shared through a pooling system operated by the Pilotage Authority, or when the pilots are Crown employees:

- (a) time off duty resulting from removal from the roster and preventive suspension should be considered time on duty for the purpose of pooling if, as a result of the investigation or of the reappraisal process, the suspicion is found to be groundless and the pilot is reinstated;
- (b) a finding of professional incompetency or unreliability which results in the cancellation or suspension of the pilot's licence should be retroactive to the date the pilot was relieved from duty, whether it began by removal from the *tour de rôle*, or by the imposition of preventive suspension;
- (c) when the suspension or the cancellation of a licence is due to physical or mental impairment, the period off duty preceding the Authority's decision should be treated as sick leave.

In Districts where the Pilotage Authority does not operate a pooling system, but controls despatching, provision should also be made for a pilot to have the right to make up his lost turns if he is reinstated.

The Act should clearly indicate that preventive suspension is a measure which forms part of the reappraisal process and may not be used in any other circumstances.

RECOMMENDATION NO. 30

The existing distinction between the reappraisal and penal judicial functions to be maintained, together with the allocation of each to different authorities

As demonstrated in Chapter 9, these two functions are dissimilar in nature and have different rules and aims. The connexity of their field of application and the dependence of the reappraisal function on the judicial function in relation to pilots' reliability may easily cause confusion if both functions are exercised by the same authority, as has frequently happened in the past when Pilotage Authorities tried to exercise both powers. In the disorder which followed, the principles of administering penal justice were applied to the exercise of the reappraisal function, and penal judicial powers were used in the field of reappraisal, with prejudicial results both to the efficiency and reliability of the service, and to the enforcement of discipline. The best practical way to prevent such confusion is to attribute each of these functions to distinct, independent authorities and to draft the Act so that there can be no possible misunderstanding.

Furthermore, to grant Pilotage Authorities penal jurisdiction over pilotage offences committed by pilots would solve only part of the problem of enforcing pilotage legislation because an additional process of enforcement has to be provided for offences committed by non-licensees. There is no satisfactory reason for the same offence to come within the jurisdiction of separate courts depending whether it was committed by a pilot or by another person.

In addition, the Pilotage Authority is not a proper authority to exercise penal judicial powers to enforce pilotage legislation because its involvement in the organization and direction of the service removes it from the disinterested, unbiased position that is a prerequisite to dispensing justice. In the scheme of organization provided in the 1873 Pilotage Act (which has so far remained unaltered), despite the fact that the Pilotage Authority was to be unconnected with the provision of pilotage services, it was granted no penal judicial power. When, under previous legislation, Trinity House of Quebec was elevated to a pilotage court, care was taken to keep the court unbiased by requiring that those Wardens who were in direct relation with the potential offenders should be deprived of the right to sit with the Corporation when it acted as a court of justice. *A fortiori*, each District Pilotage Authority is now in a position that would require a judge to disclaim competence and, hence, can not act as a court.

On the other hand, the Pilotage Authority, despite its involvement in the service, remains the best qualified authority to exercise the reappraisal function because this is part of the licensing function. It is desirable that reappraisal be carried out by the same authority which granted the licence in

order to provide the same basic criteria (C. 9, p. 353). Furthermore, the Pilotage Authority, through its intimate knowledge of the service in its District, is in the best position to appraise the performance of a pilot and his required standard of competence and fitness.

To prevent possible abuse of authority, the Act should define precisely the extent and nature of each reappraisal power (although as recommended later these powers should be greatly expanded) and should avoid using general and ambiguous language. The right of appeal to a regular court from the reappraisal decision should also be provided. It is considered that the Admiralty Court should be the appeal court in pilotage cases for three main reasons:

- (a) it is interested in shipping matters generally;
- (b) there are Admiralty Court Divisions in all the larger Pilotage Districts;
- (c) it already has jurisdiction over appeals from the reappraisal decisions of Courts of Formal Investigation (subsec. 576(3) C.S.A.).

As an additional method of making a clear distinction between the two functions, the Act should not use the terminology belonging to the penal judicial process when dealing with the reappraisal function. For instance, it should avoid the terms "charge", "accused", "guilty", "sentence", and "punishment", except to refer to the penal process. Suitable expressions include "information", "pilot being reappraised" or "the reappraised", "incompetent" or "unfit", "reappraisal decision", and "corrective or remedial award", and other expressions to the same effect which are unlikely to cause confusion with the penal process.

RECOMMENDATION NO. 31

Pilotage Authorities to be authorized to modify and increase the minimum standard of professional qualifications required of licensed pilots (and other licensees) during the tenure of their licence, and granted reappraisal powers in that field

Chapter 9 (pp. 357 and ff.) shows that at present a Pilotage Authority has no power whatsoever over a pilot's professional qualifications once his licence is issued, no matter how obviously incompetent he may be. Furthermore, in the discharge of its despatching responsibilities, it has no right not to assign a pilot when his turn comes because, under existing legislation, all pilots once licensed are considered equally qualified, and to refuse to assign a pilot on the ground of incompetence deprives him illegally of a right conferred by his licence. This situation, as explained in Chapter 9, must be corrected.

The Act should contain provisions giving Pilotage Authorities the power to vary and increase, where necessary, the minimum standard of professional qualifications required of licensed pilots during the tenure of their licence, so that their knowledge and qualifications keep pace with technological progress.

Time and again the record shows that, while some pilots are eager to learn all they can about new devices which are placed at their disposal, and make full use of them, others simply continue to pilot as before, ignoring new aids or, even worse, trying to employ them despite the fact they lack competence. This is particularly true of the use of radar by pilots who had insufficient training in its use and limitations. Several disasters have resulted. One means of achieving progressively higher standards is for each Pilotage Authority to be authorized by the Act to organize the necessary courses or training programmes, or to take advantage of existing ones, and compel licensed pilots to attend. Failure either to attend or to pass an examination at the conclusion of such a course or training period would automatically entail preventive suspension of the licence (Recommendation 29) followed by the indicated reappraisal action.

The Act should also empower each Pilotage Authority to compel a pilot to submit to an examination on his professional qualifications, both as to knowledge and competence, whenever it has grounds to believe that the pilot's professional qualifications are not up to the minimum required standard, as amended from time to time. The Act should state that such a presumption will be raised, *inter alia*:

- (a) by failure to pass routine examinations following a prolonged absence from duty, or in certain fields where competence is apt to deteriorate with lack of practice, or failure to keep up with technical progress (Recommendation 28);
- (b) by failure to attend training programmes or courses as directed by the Authority by regulations, or to pass examinations, if any, at the end of such instruction or training;
- (c) by suspension of the licence or certificate of competency when this is a prerequisite to holding a licence, resulting from the decision of a Court of Formal Investigation or a Court of Inquiry under sec. 579 C.S.A.;
- (d) following an event where the lack of professional qualifications is not clearly ruled out as a possible cause, such as in a shipping casualty where failure to interpret radar correctly may have been the cause, or one of the causes, of the casualty.

The reappraisal powers of a Pilotage Authority (and of the appeal court) are of a quasi-judicial nature and, therefore, its appreciation of the competence of a pilot will be limited by the minimum standard of qualifications as defined in the statute and regulations, and that a pilot can not be

deemed incompetent if he meets such standards. Hence, it is of prime importance for each Pilotage Authority to keep its legislation covering professional qualifications constantly up-to-date.

RECOMMENDATION NO. 32

The Pilotage Authority's reappraisal power over physical and mental disability to be extended to include jurisdiction over temporary disability

As demonstrated in Chapter 9 (pp. 361-363), the right of a Pilotage Authority to prevent a pilot from exercising his profession on medical grounds is limited at present to the right to retire a pilot compulsorily after it has been established that his impairment is of a permanent nature that renders him unfit for pilotage duties.

This limited power is inadequate in today's context. Each Pilotage Authority should have full power to prevent its pilots from piloting whenever they are found physically or mentally unfit for duty, whether the impairment is temporary or permanent.

As proposed in Recommendation 29, whenever a pilot is suspected of having a physical or mental impairment, the Pilotage Authority or its duly authorized representative should have power to take his name off the roster and hold an administrative investigation, unless the cause of the impairment is self-evident.

Every time a pilot appears to be protractedly or permanently unfit for duty he should be reappraised. If his condition is only temporary, reappraisal should not be resorted to unless he refuses to cease piloting until he is fully recovered. In that event he should be reappraised in order to give him the opportunity to prove his fitness. If he is not successful, temporary suspension should be imposed until he demonstrates that he can resume his duties. If he has not recovered within a period specified in legislation, e.g., two years, he should be permanently suspended.

In the following cases, the Act should provide that a presumption of physical or mental disability automatically arises and that, therefore, the Pilotage Authority is authorized to reappraise the pilot concerned unless it is satisfied that the situation is temporary or does not affect his ability, or that he does not object to having his name removed from the tour de rôle during the recuperative period:

- (a) after a period of absence due to illness or injury;
- (b) after an unfavourable report on eyesight, hearing, physical or mental condition;
- (c) whenever there is reason to believe that a physical or mental impairment may have been the cause, or one of the causes, of a shipping casualty.

The situation should be considered from the point of view of safety and not from the individual point of view of the pilot concerned; it is not a question of sick leave that a pilot might apply for, but solely a matter of preventing an unfit pilot from piloting.

Whenever given standards must be maintained, especially when they may vary depending upon a pilot's age or the type of service he is called upon to perform, they should be stipulated in legislation. In the absence of express standards, a general requirement that a pilot is not to suffer any impairment that will render him unfit for pilotage duties will always be difficult to enforce, except in self-evident cases.

It is considered that the procedure provided in sec. 338 C.S.A. should be altered substantially in that annual licences should no longer be issued to pilots over 65. Instead, permanent licences should continue until pilots reach the final age limit of 70 provided in the Act (or an earlier age between 65 and 70 as defined in regulations), provided they continue to meet the required physical and mental standards.

Pilots who reach the age of 65 should be subject to compulsory physical and mental examinations annually, and any unfavourable report should initiate reappraisal.

RECOMMENDATION NO. 33

Reappraisal of moral fitness to be adjusted to the new pilotage organization but to remain subject to conviction by a regular court for a specified pilotage offence

Because moral fitness is a state of mind, an imponderable which can only be inferred from an individual's behaviour, and because all acts of misconduct which are serious enough to arouse a presumption of unreliability should be defined as pilotage offences, it is considered that the procedure adopted by Parliament in Part VI C.S.A. (vide C. 9, p. 370) to assess moral fitness is wise and adequate, and should be retained. It has the advantages of forcing a distinction between reappraisal and discipline and requiring the enforcement of discipline, which is overlooked when reappraisal can be effected independently as currently happens in cases dealt with under Part VIII. This irregular situation should be discouraged.

From the procedural point of view, it has the advantage of being simple and adequate, and preventing unnecessary duplication of trials and the possibility of embarrassing contradictory decisions. It simplifies reappraisal proceedings in that the factual situation need not be established (vide C. 9, p. 370). The Pilotage Authority has only to decide whether, in the light of the pilot's past record, the evidence he may adduce and the pleading he may

make, the presumption of unreliability created by the conviction has been refuted or not, and to award the appropriate corrective, if remedial action is indicated.

The list of statutory offences which come under the reappraisal jurisdiction of Pilotage Authorities should be revised to meet the requirements of the new organization: all offences of general application should be statutory and only those of a truly local character should be defined by regulation.

For the most serious offences, the Act should settle the question of reappraisal by decreeing automatic forfeiture of a pilot's licence upon his conviction; in other words, when there is a clear case of unreliability, there is no reason to require reappraisal which can be no more than perfunctory. The Act should provide automatic forfeiture upon conviction of any indictable offence, whether under the Criminal Code or pilotage legislation, or of other serious offences such as impairment caused by intoxicating liquor or narcotic drugs while a pilot is on duty or about to go on duty (which, *inter alia*, ought to be a statutory offence) (vide Recommendation 11).

RECOMMENDATION NO. 34

The Pilotage Authority and the appeal court in the reappraisal process to be untrammelled by rules of evidence and procedural requirements, provided the pilot is afforded an opportunity for full defence; any doubt to be resolved in favour of the safety of navigation

Because of the special nature of the pilotage service, speed and flexibility of procedure are essential if Pilotage Authorities are to discharge their reappraisal responsibilities efficiently. A reappraisal decision is only an administrative decision and the fact that it must be reached in a quasi-judicial manner does not mean that the process should be given the publicity nor be governed by the rules and procedural requirements that accompany the dispensing of justice, but only that the reappraisal authority has no discretionary power and must be guided, on one hand, by legislation and, on the other, by the factual situation. The only part of the process that may cause some difficulty is ascertaining the facts and, in this respect, the important point is not the manner in which the facts are ascertained but whether the true factual situation is brought out. Since public hearings entail lack of flexibility by requiring a formal procedure, full discretion on the matter should be left to the Pilotage Authority concerned to ensure efficiency and freedom of action.

One principle which applies generally is the right of the pilot to an adequate opportunity to defend his rights. Also, in view of the potentially serious consequences for the pilot, the Act should assert his right to be

assisted by counsel. This does not mean that testimony must be given under oath or taken during the course of reappraisal or in the presence of the pilot and his counsel. To meet the *audi alteram partem* requirement, it is sufficient if, at any time during the reappraisal before the final decision is rendered, the pilot is informed of the material the reappraisal authority intends to use as evidence and then is given full opportunity to challenge any part of it, and to produce any further evidence or argument on his own behalf.

In order to expedite proceedings, all pertinent evidence already in the Pilotage Authority's possession prior to the beginning of the reappraisal, together with all existing evidence obtainable from other sources (whether it consists of testimony, statements or reports on examinations), should be considered admissible evidence (preconstituted evidence). The reappraisal process should not be assimilated to a trial before a court of justice, where the judge is a stranger to the case until it is brought before him. In a reappraisal case, the reappraisal authority has, in fact, been involved as licensing authority and in the discharge of ensuing surveillance responsibilities ever since the pilot's licence was granted. Reappraisal is, in reality, merely a continuation of the licensing process and consists of bringing it up to date. It would be unrealistic and unreasonable to require a Pilotage Authority to put aside what it already knows about a case, just as it would be to select another body or person as reappraisal authority. No one is in a better position than the District Pilotage Authority to appraise a pilot's qualifications.

The following information, *inter alia*, should form part of such preconstituted evidence:

- (a) the complete record of the pilot as contained in his official file to the extent it is related to the matter under investigation;
- (b) the conviction which gave rise to reappraisal, if it is a case of moral fitness, together with all pertinent material including the transcript of evidence contained in the docket of the penal tribunal which heard the case;
- (c) testimony under oath, obtained prior to reappraisal, but for the purpose of reappraisal, of witnesses who are unlikely to be available (Recommendation 28);
- (d) the full report, together with supporting documents and testimony, of the administrative investigation that may have preceded reappraisal and on which the decision to proceed with reappraisal was based, except opinions expressed by an investigator charged with obtaining testimony;
- (e) the written report of experts who carried out a survey of the situation to the extent it is pertinent to the case;
- (f) the written report of those who examined the pilot for physical or mental fitness or professional competency, if pertinent to the matter under investigation.

Because reappraisal is, in effect, an administrative function to enable a Pilotage Authority to discharge its personal responsibilities, the Authority's freedom of action should never be hampered by a requirement that a complaint must be laid as a prerequisite to reappraisal. The Act should stipulate that a District Pilotage Authority must act *proprio motu* when it has reason to believe that a pilot is a safety risk. It is the personal responsibility of each Pilotage Authority to guarantee the fitness of the pilots it assigns to ships and it would be an unrealistic restriction on its freedom of action to make the exercise of this function conditional on a complaint by a third party. As seen in Chapter 9, this was one of the failings of the former regulations enacted under subsec. 319(j), 1934 C.S.A., which in practice rendered the regulation inoperative (vide C. 9, p. 368). In earlier legislation, this point was clearly understood; for instance, sec. 99 of the Pilotage Act of 1886 made special mention of it (sec. 100 contained a similar provision regarding the District of Quebec). The pertinent part of this section reads as follows:

"99. Whenever any ship sustains damage through the fault of any branch pilot for and above the harbor of Quebec the pilotage authority of the pilotage district of Montreal may, in its discretion, and upon such information as it deems expedient, and with or without complaint by any person, investigate the matter and declare the branch of such pilot forfeited; . . .".

Because reappraisal is a process relating to a trial, the pilot is entitled to know when the case commences and when it finishes. It is considered that the Act should prescribe as procedural requirements that the beginning of the process should be marked by serving the pilot with a document (which might be referred to as "a letter of intent") wherein the nature and cause of his reappraisal is stated, and that the final decision as well as any interim decision should be in writing and become part of the record.

The Act should state that when reappraising a pilot's qualifications any doubt should be resolved in favour of public interest, i.e., in favour of the safety of navigation. The aim of the reappraisal process is to establish whether a pilot is, or is not, a safety risk. If a *prima facie* case of unfitness is established and, after the pilot has been given an opportunity to refute the presumption thus created, the evidence is inconclusive and reasonable doubt remains, the pilot should be treated as a safety risk. The interest of the public transcends the personal interest of individuals in an essential public service. Because of the potential danger to waterborne traffic which is vital to Canada, the lives of people and the safety of valuable ships and cargoes should not be placed in the hands of a pilot who is unable to prove his competence and for whom his Pilotage Authority can not positively vouch. Once the facts of a situation or an event involving a pilot creates a

presumption that he is a safety risk, it should be the pilot's responsibility to demonstrate that he is not, and that he remains the expert he is expected to be.

In order to enable the Pilotage Authority to unravel the factual situation while still guaranteeing the pilot the means to defend his rights, the Authority (in the exercise of its reappraisal function) must be endowed with all the extraordinary powers of investigation granted to a court of justice (those proposed in Recommendation 28 for administrative investigations), i.e., *inter alia*, to force the production of documents; to compel witnesses, including the pilot concerned, to attend and give evidence under oath; if necessary, to board and inspect vessels; to cause surveys to be carried out by experts; to compel the pilot to submit to a medical examination and an examination as to his professional competency.

The very nature of the service demands flexibility in the procedure to be followed and in the ways and means of obtaining necessary information and providing the pilot with ample opportunity to make his defence. Additional evidence, other than the preconstituted evidence, ought to be obtained at the request of the Authority or the pilot, either directly by the Authority or indirectly through investigators or experts duly appointed by the Authority for that purpose (the pilot may or may not be given the opportunity to attend) and by the most expedient means in the circumstances such as oral testimony, affidavits, written statements obtained by correspondence, telegrams, teletype messages or recorded telephone conversations.

In order to give the pilot involved a reasonable opportunity to defend his rights, he must be made aware of all the preconstituted evidence the reappraisal authority intends to use, and also of the testimony and other evidence obtained during the reappraisal. At the pilot's request, the reappraisal authority should obtain statements from other witnesses or, in reply to questions the pilot wishes to ask those who have already filed statements, obtain additional statements and, if necessary, summon the attendance of witnesses or experts to allow the pilot to examine or cross-examine them under oath.

To prevent abuses by a pilot having witnesses summoned without just cause, the Pilotage Authority—no matter what its decision in the case may be—should be empowered by a provision in the Act to award against the pilot any costs incurred as a result of his unreasonable requests.

The Act should provide the pilot with the right to appeal against any decision of the reappraisal authority. As proposed in Recommendation 26, it is considered that this appeal should take place before a regular court and that the Admiralty Court is the indicated tribunal for the purpose. The appeal court should not be limited to the evidence used and obtained by the reappraisal authority. The preconstituted evidence, together with affidavits and documents filed before the reappraisal authority, and any record of evidence obtained by the reappraisal authority should form the record to be

placed before the appeal court. Thereafter, the appeal should take the form of a trial *de novo*. The appeal court should have the power to award appeal costs against either the Pilotage Authority or the pilot at its discretion, including the costs of the other party, the amount of these costs being liquidated by the court unless a tariff is provided by appropriate legislation.

To sum up, it is considered that, for the sake of clarity and to avoid any possible argument, the Act should enunciate the following principles applicable to the reappraisal process:

- (a) the right and duty of the Pilotage Authority to initiate *proprio motu* the reappraisal process whenever there is reason to believe that a pilot has become a safety risk, whether it be for lack of professional competency, or for physical, mental or moral unfitness;
- (b) the right of the pilot involved to full defence and assistance by counsel;
- (c) mandatory procedural requirements to be limited to those essential in order to provide the flexibility and freedom of action needed for the efficient performance of the reappraisal process in the various types of cases;
- (d) the reappraisal authority to be vested with full investigatory powers;
- (e) the reappraisal authority not to be bound by the rules of evidence applicable to courts of justice;
- (f) once a *prima facie* case of unfitness is established, the onus of refuting the presumption to rest upon the pilot involved;
- (g) in addition to the power to award the appropriate corrective (Recommendation 37), the reappraisal authority to be authorized to impose reappraisal disbursements on the pilot concerned if they were caused by his unreasonable actions or requests;
- (h) as a check against injustice and error, the pilot to have the right to appeal to the Admiralty Court against an adverse reappraisal decision.

RECOMMENDATION No. 35

Penal jurisdiction to remain with regular courts; a penalty system to be adopted as a summary procedure for dealing with minor offences

Without effective means of enforcement, a law becomes meaningless and the powers it is intended to confer are, in effect, denied. If pilotage is to function properly as a necessary public service, there must be a simple, efficient method of enforcing legislative provisions and lawful orders. In view of the special circumstances in which the service operates, it should be possible to deal with everyday disciplinary problems without unduly disturbing normal administrative arrangements.

It is considered that the present system of resorting to regular courts for the prosecution of pilotage offences is the only adequate, practical method of enforcing pilotage legislation and the powers derived therefrom. Since Pilotage Authorities have a major interest in the provision of services and wield extensive control over their pilots, it is improper, and even repugnant, for them to possess any judicial penal jurisdiction. The degree of importance of an offence does not alter the basic principle that the dispensation of justice must be by an unbiased and disinterested court.

On the other hand, an obligation to prosecute every single minor offence before a penal court might prove detrimental to the enforcement of discipline for two reasons: the number of cases might occupy both pilotage officials and the court unnecessarily; serious delays might be incurred unless a special court is created for the purpose. This course of action is not recommended because pilotage courts might have to be created in many Districts—an unwarranted step in view of the availability of regular tribunals.

It is considered that a system of penalties imposed by legislation is the correct solution to the problem of dealing with minor offences. During the Commission's study of subsec. 329(g) C.S.A., it was thought that, on account of the presence of the term "penalty" considered in the light of sec. 709, a similar system had been adopted in 1934 but this interpretation was discarded because it did not agree with the context of the Act (vide C. 9, p. 380 and ff.). It is believed, however, that herein lies the answer to the problem of enforcing day to day problems of discipline.

Under the usual penal process, the sentence of a court creates the punishment and a debt exists only as the result of, and from the date of, a sentence which imposes a fine. Therefore, under this system, the process of a penal trial must be resorted to in every single case, no matter how minor. On the other hand, as explained in Chapter 9 (p. 380), a penalty is a pecuniary punishment in a fixed amount which is imposed by legislation; it is a debt which is automatically owed when the offence is committed, a debt which is recoverable by civil proceedings unless paid voluntarily. Under the system of penalties, a pecuniary punishment is automatically imposed when a breach of disciplinary regulations is committed and the only responsibility of the Pilotage Authority is to collect the amount due. In most cases, the pilot complies voluntarily and pays the debt, with the result that the whole question is settled out of court; if he refuses, the enforcement powers of the regular courts have to be resorted to and the rôle of the court is limited to ascertaining the existence of the debt and establishing the pilot's refusal to pay voluntarily. An affirmative judgment is then enforced through the normal means of execution pertaining to the court.

Under this system also, the Pilotage Authority has no discretion whether to apply punishment or not; once the offence is committed, a debt to the

Crown exists and the Pilotage Authority has no discretion but to collect. Sec. 709 C.S.A. stipulates the procedure to be followed for collecting such penalties if the pilot refuses to pay voluntarily, that is, "either by summary conviction or by civil action or proceeding . . . before any court having jurisdiction in the amount of the penalty". Neither the Pilotage Authority nor the court has any discretion as to the amount of the judgment, which is fixed in applicable legislation. At the hearing, the plaintiff, i.e., the Pilotage Authority, has the onus of establishing the claim, i.e., that the defendant committed the breach which caused the indebtedness. On the other hand, the defendant has every opportunity to present his defence. Whether an appeal lies against the judgment so obtained at the suit of either party is governed by the laws defining the rights of appeal from the judgment of the court concerned.

Under this procedure, the Pilotage Authority never sits in judgment; its only rôle is to ascertain, or at least to satisfy itself, that the offence has been committed and, therefore, that the debt is owing. The system also has the advantage of providing a speedy method of disposing of minor disciplinary cases. Generally, the facts are self-evident and the pilot involved will pay voluntarily without letting the case go to court and making himself liable for costs in addition to the penalty. This means also that if the pilot does not comply voluntarily or contests his liability, the punishment can not be enforced against his will without a court order which can not be obtained except through due process.

No special procedure needs to be established or followed before recovery procedure of penalties is instituted, except that payment should be demanded in order to be able to establish before a court refusal on the part of the pilot to accept liability or to pay. At this stage, the Pilotage Authority is not acting as a tribunal but merely in an administrative capacity as a creditor trying to establish whether a debt exists. Therefore, any communications and discussions between the Authority and the pilot concerned need not be carried on in any particular way. Before taking the administrative decision to launch recovery proceedings, the Pilotage Authority should be reasonably sure of its ground, bearing in mind that it has the burden of proof as plaintiff. Since such a recovery is a civil case, the pilot (as defendant) is a compellable witness.

This method has the advantage of preventing arbitrary action while providing a speedy, effective disciplinary procedure with the least inconvenience for all concerned.

The application of this summary procedure should be restricted to minor disciplinary cases involving pilots and other licensees, and possibly also to other minor offences, whether created by statute or by regulation, that might be committed by other persons. Serious offences should continue to be under the exclusive jurisdiction of penal tribunals and subject to the principles governing the administration of penal justice. The Act should contain a

provision placing under the exclusive jurisdiction of regular penal courts all offences for which conviction gives reappraisal jurisdiction to the District Pilotage Authority. Such a provision is warranted because only serious offences should be deemed to create a presumption of unreliability and the grave consequences for the pilot concerned warrant that the commission of such offences should be legally established beyond reasonable doubt. Furthermore, as stated earlier, this method has the marked advantage of clearly dividing the two fields of jurisdiction: penal and reappraisal. This distinction is an absolute necessity.

The penalty system requires that both offences and penalties be specifically defined in legislation without discretion because, otherwise, the debt would not automatically exist, but would be the result of an administrative or judicial decision which would amount to a fine. There is no objection, however, if a scale of penalties is provided for subsequent offences of the same nature, as long as the amount owing after the commission of each offence can be definitely ascertained merely by referring to the applicable legislation.

As pointed out in Chapter 9, it is not necessary to cover all possible offences exhaustively for the sake of discipline and respect for the law. Normally, the imposition of penalties would be the subject-matter of regulations and it is easy to create an appropriate new offence by enacting a covering regulation. It should be borne in mind that by multiplying offences, the Pilotage Authority multiplies its obligations because it is bound by the legislation it has created. For instance, an exhaustive set of disciplinary regulations obliges the Pilotage Authority to undertake punitive action every time any of these regulations is breached, no matter how minor the case may be. These regulations should be kept to the necessary minimum to assure the maintenance of discipline and their provisions should be clear and realistic.

There might be an objection to the rigidity of a system of automatic punishments which makes no allowance for extenuating circumstances but it should be borne in mind that extenuating circumstances mean that the person charged is guilty of the offence and the importance of the circumstances is negligible in view of the small penalty imposed. In extreme cases, however, there will always remain the possibility of obtaining a remission of all or part of the debt through an *ex gratia* gesture by the Crown or by the Central Authority, if so empowered by the Act.

The proposed system has the advantage of being equally applicable to all types of organization the pilotage service may adopt.

Furthermore, in order to preserve the District Pilotage Authority's freedom of action, the Act should clearly stipulate the power of the Authority to act as plaintiff for the recovery of penalties, and as complainant in the prosecution of pilotage offences.

Costs, whether judicial or extra-judicial, incurred through either process and not recoverable as part of the judgment, should automatically form part of the administrative expenses of the District.

Furthermore, under the proposed system, in both processes the pilots—as they have repeatedly requested—are guaranteed full protection, a right which was denied them by the methods of enforcement previously adopted by Pilotage Authorities.

RECOMMENDATION No. 36

**The remedial power of courts created under Part VIII C.S.A.
to be directed against pilots' certificates of competency and
not their licences**

The Commission is only indirectly concerned with Part VIII of the Canada Shipping Act, but considers it appropriate that the Minister of Transport, who has the overall responsibility for safety of navigation, should have the legal authority to prevent any person considered a safety risk from taking charge of the navigation of a vessel in Canadian waters. On those occasions when a pilot is involved, the Minister should be untrammelled because it is a pilot, or by any action a Pilotage Authority may take with regard to the pilot. Conversely, the Pilotage Authority should not be influenced in its action by a decision the Minister of Transport may or may not make.

With regard to remedial action, a problem arises because neither the Minister as such nor the courts of Part VIII have any control over the issuance of licences to pilots. These courts may cancel or suspend a pilot's licence, but there is nothing to prevent the Pilotage Authority concerned from issuing a new licence.

If approval is given to the Commission's Recommendation 13, which provides that possession of a Master's or mate's certificate of competency issued under Part II of the Act is a prerequisite to holding a pilot's licence, the remedial action of these courts should be changed by appropriate amendments to subsec. 552(2) and sec. 568 of Part VIII to provide for judgment against the certificate of competency held by the pilot but not against his pilot's licence. In that event, cancellation of the certificate would automatically entail forfeiture of the licence, and prevent the issuance of a new one, unless the now ex-pilot succeeded in having his certificate of competency restored by the Minister of Transport, as provided by sec. 142. This, however, would not be done unless the Minister was fully satisfied that from his point of view the pilot was no longer a safety risk. Similarly, suspension of the certificate would automatically cause suspension of the licence and, if the provisions of secs. 568 and 579 are appropriately

amended, as recommended in Recommendation 37, such courts could then impose whatever remedial action they considered indicated as a condition to lifting suspension of the certificate.

Reviving the certificate of competency or ending its suspension would not, however, automatically cause reinstatement of the licence, which would then be governed by the pertinent provisions of the pilotage legislation of the District concerned.

This recommendation respects and confirms the exclusive jurisdiction and independence of both the Minister of Transport and the Pilotage Authority and, it is believed, is in the interest of the safety of navigation.

RECOMMENDATION No. 37

Power to impose suspension *per se* or pecuniary penalty following reappraisal to be denied; reappraisal award to consist only of cancellation of the licence or appropriate remedial action

The basic purpose of reappraisal is not to punish an offender or a negligent pilot but to prevent a person considered a safety risk from piloting (vide C. 9, p. 411).

If a pilot is considered no longer qualified to act as such because he is unfit and his condition can not be cured, or the offence of which he was found guilty is extremely serious, or on account of his past convictions he no longer can be trusted, the only remedial action that can be taken by the reappraisal authority is to cancel his licence. If, however, there is hope that the situation may be corrected, the only proper award is a conditional suspension of his licence, the condition being that the deficiency be made good.

A mere term of suspension or a pecuniary penalty can not guarantee that, when the term has expired or the amount paid, the pilot will possess the qualifications he lacked thus making him a safety risk. No amount of money or period of suspension will *per se* make a fit pilot out of an unfit pilot. In a case of moral unfitness, a punishment may possibly serve as a deterrent by making the pilot realize the gravity of the situation, but there are many other ways to achieve the same end and, at the same time, attempt to increase his general qualifications. A prolonged term of suspension is likely to be professionally detrimental to a pilot because it deprives him of the regular experience he needs to maintain and improve his qualifications. Instead, it is considered that the Act should authorize reappraisal authorities, whether the Pilotage Authority or one of the administrative courts of Part VIII, to impose the remedy which is deemed appropriate in each case, with suspension being imposed as a preventive measure until the decision is implemented.

If unfitness is caused by lack of a required qualification in a certain subject of the pilot's professional knowledge or competence, he should not be allowed to pilot until the deficiency has been overcome. This situation should normally call for the suspension of his licence until he has passed an examination establishing this aspect of his competence. If he does not succeed within a given time, the suspension should be made permanent. As an additional requirement, the reappraisal authority might require the pilot to take a special course in a given subject or take special training, or undergo a certain period of apprenticeship, provided that these are part of the normal training a pilot requires to obtain and, later, to retain, his licence. Where a grade system exists, the award may take the form of lowering, without suspension, the licence to a grade for which the pilot is still qualified despite his deficiency, and either leaving his promotion back to higher grades to the normal course stipulated in the regulations, or providing an earlier opportunity, such as successfully passing the required examination in the subject in which he was deficient.

The same principle applies to physical and mental fitness. If the condition is curable, the pilot should be given a reasonable period in which to establish that he is no longer suffering from the impairment. If he is successful, his licence can be reinstated; otherwise, the suspension becomes automatically permanent after a specified lapse of time. In cases where the impairment is due to detrimental habits, such as alcoholism, a pilot should not be reinstated until proof is given that he is cured, or that he has been abstinent for at least a year and, also, that, during that year, he has followed the regular training of apprentices or has undergone training with other pilots in order to maintain his competence. It is interesting to note that the Trinity House Act of 1849 (12 Vic. c. 114) contained a provision to that effect. Sec. 25, which was repealed in 1873 by 36 Vic. c. 54, reads as follows:

"Pilot dis-
branched
for drunk-
enness
may be
reinstated.

XXV—And be it enacted, That a Pilot deprived of his Branch for drunkenness, may recover it by proving by good and valid certificates that he has conducted himself with sobriety and steadiness during two consecutive years, after the date of his interdiction."

The question of reliability (moral fitness) is somewhat more difficult, since reliability can be tested only by a person's actions, behaviour and performance. If a pilot is considered unreliable but not a hopeless case, he should be given a chance to prove that he can still be trusted. One solution might be to revert the pilot to the status of apprentice, or, if the grade system exists, to lower his licence for a probationary period to a grade, if any, where his unreliability is not likely to cause damage, and to review his status at the expiration of the probationary period.

RECOMMENDATION NO. 38

The Act to grant the District Pilotage Authority and the Central Pilotage Authority emergency powers to provide reasonable temporary pilotage service through alternative plans in case of a strike by pilots where the service is deemed essential in the public interest

The grounds for this recommendation are enunciated in Chapter 9, Comment (b), (pp. 430 to 433) to which reference is made.

In order to preserve the intended effectiveness of these emergency powers and to maintain their character as safeguards of public interest, they should be fully enunciated in the Act and none of them should come under the regulation-making power of District Pilotage Authorities. The inclusion of the necessary provisions in District regulations would be liable to cause unnecessary contention and, if at a time of crisis they were lacking, hasty legislation would be required, thus providing an additional source of irritation while, at the same time, delaying unduly the exercise of emergency measures.

Whether the pilotage service in a District or in a given part of a District is, or is not, essential in the national interest is for decision by the Central Pilotage Authority and should normally have been taken in advance, since it is the main criterion that determines the constitution and organization of the District. In certain circumstances, in time of crisis, other services or parts of them that are normally non-essential might prove to be vital. The Central Pilotage Authority should have power to make a decision to that effect so that the necessary temporary measures can be taken.

Alternative plans should be the prime responsibility of the District Pilotage Authority, both for enunciation and implementation. The Act should empower the Central Pilotage Authority to supersede a District Pilotage Authority if, in time of crisis, the latter fails to act or to take all measures required in the circumstances.

RECOMMENDATION NO. 39

Pilot fund legislation to be abrogated; existing pilot or pension funds to cease as a responsibility of Pilotage Authorities and to be disposed of in such a way as to respect and guarantee acquired rights; in Districts where pilots are not Crown employees, welfare and insurance schemes to be imposed by District regulations if required by a substantial majority of the pilots

Chapter 10, to which reference is made, examines the nature of pilot funds as an institution, analyses the governing statutory provisions and reviews the changes that occurred both in the social environment and in

legislation from the time pilot funds were introduced into pilotage legislation. This study led to the conclusion that pilot funds, as such, are outdated and now serve no useful purpose because any financial protection pilots need can more easily and effectively be provided by other means.

Neither is there a need for compulsory pension funds whose sole purpose is to provide a source of revenue after retirement. This amounts to compulsory saving and, therefore, is an infringement on individual freedom which can not be justified as being in the public interest because a basic minimum pension is now guaranteed through the Old Age Security Act and the Canada Pension Plan, and additional assistance is provided under other welfare legislation.

Hence, it is considered that pilot funds should be abolished as an institution and all statutory provisions governing them should be abrogated.

Similarly, Pilotage Authorities should be obliged to desist from creating, providing and administering pilot and pension funds and should be relieved of all the responsibilities they now bear relative to existing District pilot or pension funds which should be discontinued forthwith.

Care should be taken, however, that acquired rights to the benefits of such funds are fully protected. If the pilots wish to obtain pension protection in addition to what is now provided under the Old Age Security and the Canada Pension legislation, it should be their responsibility, either as individuals or as a group, to so provide.

Nor is there any valid reason for making an exception of the Quebec Pension Fund whose financial position, although gradually improved in recent years, still shows an actuarial deficit of over \$6,000 per active pilot. Its governing legislation provided for a pilot fund that was never supposed to be in deficit and not for a pension fund. The misuse of these provisions enabled pilots to obtain pension benefits disproportionate to the solvency of the fund and their contributions, at the expense of their successors, thus leading to the present unsatisfactory situation.

When pilots become public servants the question of future protection is automatically settled most adequately because they become eligible for the extensive pension, health and welfare privileges provided by the Crown to its employees. No pension plan or group insurance benefits that the pilots can obtain from private enterprise can equal in cost, benefits and other advantages the assistance provided by the Crown to its employees. The principal reasons are:

- (a) the Crown makes substantial financial contributions;
- (b) the very large number of participants permits beneficial averaging;
- (c) the Crown offers a firm guarantee of solvency;
- (d) although neither private nor Crown plans contain an escalation clause, there is always the possibility that the Crown will increase its benefits to offset the rising cost of living and the lower purchasing power of the dollar.

With reference to existing District pilot or pension funds, the Commission fully endorses the disposal of the Sydney District pension fund when the Sydney pilots became public servants. In consideration of a transfer of the District fund assets to the Crown, the pilots were given retroactive benefits for the purpose of the Superannuation Act based on a formula which took into account their aggregate contributions to the District pension fund and their previous years of service in the profession. In addition, the Crown assumed the District fund liabilities that had accrued up to the date of the surrender of the assets.

When pilots are not Crown employees, the Crown should bear no responsibility for future pension benefits or welfare, health and other protection. However, the new pilotage Act should stipulate that, for the purpose of statutes such as the Canada Pension Plan Act, Workmen's Compensation and similar legislation, the Crown is considered the employer of all pilots and responsible for the employer's contribution. These contributions should be considered part of District operating expenses (vide in this regard the different attitude taken by various Pilotage Authorities concerning contributions to the Canada Pension Plan, C. 4, pp. 81-82).

Existing pilot or pension funds might be individually entrusted to the Crown for liquidation, i.e., acquired rights to benefits should be honoured as they mature and until they are exhausted, and the District concerned should be required to continue to contribute as necessary to maintain the solvency of the fund. According to the latest actuarial evaluation and unless the situation has deteriorated in other Districts since that time, only the Districts of Halifax and Quebec should be required to continue contributions to these holding funds. An even better solution would be to allow the pilots to dispose of a fund as was done by the pilots of the Districts of New Westminster and British Columbia, provided acquired rights to pension benefits are undertaken by the trust or insurance companies and the Crown receives adequate guarantees that these acquired rights will be honoured as they become due.

When the pilots as a group have agreed to subscribe to pension, health, security or welfare plans, provided the decision was reached by a substantial majority of the group members, e.g., two-thirds as recommended in Recommendation 25, it is considered that the agreed plan should be made compulsory for all members of the group and power should be granted to deduct individual contributions at source. This should be made a subject-matter of District Regulations which the District Authority should be required to include in its regulations when it has been so decided by the required majority of the members, unless the proposal is totally unreasonable or unjust. Similarly, where the pilots' earnings are pooled, authority should be granted to pay from the common fund group contributions to plans and schemes recognized by District Regulations or, if the contributions are on an individu-

al basis, from the share accruing to each pilot. The Act should also authorize the pilots to establish a similar procedure to provide out of the pool for holiday privileges and sick leave remuneration.

Under the proposed system, all pilots who are not Crown employees will have the right to decide whether or not they will be provided with financial protection and the nature of such assistance. Whether they form part of a large or a small District, they will all have a reasonable opportunity to make provision for their own welfare, in contrast to the District pension fund formula which denied this right to the pilots of small Districts.

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